Supreme Court, U.S.
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No.

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# IN THE

# Supreme Court of the United States

OCTOBER TERM 1996

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FAIRPORT INTERNATIONAL EXPLORATION, INC.,
Petitioner,

v.

THE SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, *in rem*,
Respondent,

STATE OF MICHIGAN
Intervenor.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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56 pp

# QUESTION PRESENTED

## 1. INTRODUCTORY STATEMENT

This case presents an important question regarding the exercise of federal admiralty jurisdiction. It involves the application of Abandoned Shipwreck Act, 43 U.S.C. 2101-2105, ("the ASA"), to an admiralty claim advanced by petitioner, Fairport International Exploration, Inc. (Fairport). This action involves an admiralty claim to a wrecked motor vessel, the Captain Lawrence, which sank in Lake Michigan in 1933. The State of Michigan (Michigan) intervened in this action at the district court and claimed title to the same shipwreck under the ASA. The district court held that Michigan's claim was colorable under the ASA and dismissed the suit on jurisdictional grounds. The district court held that the 11th amendment precluded the court from litigating Fairport's claim.

The overall question, therefore, reduces to this: is the ASA applicable to the wreck to which Fairport is attempting to lay claim? If it is not, then Michigan does not have a colorable claim to the res, and the district court erred in dismissing Fairport's suit. The ASA's applicability turns of the question of whether the original owner or his successors in interest ever "abandoned" the Captain Lawrence.

## 2. QUESTION

1. Did the Court of Appeals for the Sixth Circuit err by holding that the Abandon Shipwrecks Act allows a federal court sitting in admiralty to find by circumstantial evidence alone that a shipowner abandoned his vessel instead of

requiring evidence that the ship owner affirmatively renounced title to his vessel?

## PARTIES TO THE PROCEEDINGS

The petitioner in this case is Fairport International Exploration, Incorporated. Pursuant to Supreme Court Rule 29.6, Fairport International Exploration, Incorporated states that it has no parent companies or nonwholly owned subsidiaries.

The respondent in this *in rem* admiralty action is the wreck of the motor vessel *Captain Lawrence*.

The intervenor in this action is the State of Michigan.

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STATE OF MICHIGAN

*Intervenor.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Fairport International Exploration, Inc. respectfully petitions for a writ or certiorari to the United States Court of Appeals for the Sixth Circuit.

## OPINION BELOW

The decision of the United States Court of Appeals on the merits of petitioner's claim is reported at 105 F.3d 1078 (6th Cir. 1997).

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment in this action on January 30, 1997. The United States Court of Appeals for the Sixth Circuit entered an order denying petitioner Fairport International Exploration's petition for rehearing on March 7, 1997. 28 U.S.C. § 1254 (1) gives this Court the jurisdiction to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

2. The Abandoned Shipwreck Act, 43 U.S.C. 2101-2105, (the ASA), provides in pertinent part:

§ 2101

The Congress finds that-

(a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and

(b) included in the range of resources are certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention.

§ 2102

For the purposes of this chapter -

(a) the term "embedded" means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof;

(b) the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 470a of Title 16;

(c) the terms "public lands," "Indian lands," and "Indian tribe" have the same meaning given the terms in the Archeological Resource Protection Act of 1979 (16 U.S.C. 470aa-470*ll*)

(d) the term "shipwreck" means a vessel or wreck, its cargo, and other contents;

(e) the term "State" means a state of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands; and

(f) the term "submerged lands" means the lands -

(1) that are "lands beneath navigable waters" as defined in section 1301 of this title;

(2) of Puerto Rico, as described in section 749 of Title 48;

(3) of Guam, the Virgin Islands, and American Samoa, as described in section 1705.

. . .

§ 2105 Rights of Ownership

(a) United States Title

The United States asserts title to any abandoned shipwreck that is-

(1) embedded in the submerged lands of a State;

(2) embedded in coralline formations protected by a state on submerged lands of a state; or

(3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register.

. . .

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

## STATEMENT OF THE CASE

In 1931, Wilfred Behrens, a marine salvager, purchased a gasoline-powered vessel named the *Captain Lawrence* from the Sea Scouts of Milwaukee. In the summer of 1933, Behrens outfitted a salvage expedition, boarded the *Captain Lawrence*, and set sail for Poverty Island, a small

island in northern Lake Michigan. He intended to do salvage work around the island that summer.

On September 19, 1933, the *Captain Lawrence* foundered, ran aground, and sank in a storm off the north end of Poverty Island. Behrens and his entire crew of four escaped the wreck without injury and swam to shore. Behrens and his crew had escaped injury, but the ship was lost. The next day, Behrens declined a U.S. Coast Guard offer of assistance because he and his crew were safely ashore and they were in no need of any lifesaving services. There is no evidence in the record to suggest that the Coast Guard offered to help Behrens salvage his vessel. Behrens filed a casualty report with the Coast Guard on November 2, 1933, estimating the value of the *Captain Lawrence* as $200.00 and listing the vessel as a "total loss."

In the summer of 1934, Behrens returned to Poverty Island to attempt to salvage the *Captain Lawrence*. However, he was unable to locate the vessel or even find any portion of the shipwreck. Behrens undertook no positive, affirmative act to abandon his interest in the *Captain Lawrence* after it sank in 1933. No evidence of any such positive, affirmative act of Behrens' abandoning his interest in the *Captain Lawrence* appears anywhere in the record of this case. The Sixth Circuit alluded to evidence in the record that vessels of the type similar to the *Captain Lawrence* would have been worth, when new, just over $14,000 in 1933. Finally, Behrens had not insured the vessel.

Wilfred Behrens was the sole owner of the *Captain Lawrence* when it sank. Behrens, who died intestate is 1959, is presently survived by his ex-wife, Elsie, whom he divorced in 1950 in Milwaukee; and 5 children, one of whom is Gladys Nally of Janesville, Wisconsin. Each of Behrens' children and Behrens' ex-wife assigned any interest they may have in the *Captain Lawrence* to Behrens' daughter, Gladys Nally. Ms.

Nally, in turn, sold any and all rights to the *Captain Lawrence* that she may have as either Behrens' heir or her family's assignee to Fairport.

In the summer of 1993, the President of Fairport, Steven Libert, ended a 14 year search for the *Captain Lawrence* when he located artifacts on the floor of Lake Michigan which he identified as the *Captain Lawrence's* propeller shaft, its anchor, and a blade of its propeller. He filed the underlying admiralty action in U.S. District Court for the Western District of Michigan seeking title to the vessel under the maritime law of finds or, in the alternative, seeking a salvage award under the maritime law of salvage. He also asked the district court to enjoin other salvagers from removing artifacts from or diving on the Captain Lawrence. Michigan intervened, asserting title to the shipwreck under the ASA and asking the district court to dismiss Fairport's action for lack of jurisdiction. Michigan argued that the action was, in effect, one against a state barred by the Eleventh Amendment. The district court granted Michigan's motion to dismiss and dismissed Fairport's action, holding that the state of Michigan asserted a "colorable claim" under the ASA to the *Captain Lawrence* because the *Captain Lawrence* was an abandoned shipwreck. Therefore, held the district court, the ASA transferred title of the wreck to Michigan and the Eleventh Amendment divested the federal court of jurisdiction to litigate Fairport's claim.

Fairport filed a timely appeal of the district court's judgment with the Sixth Circuit Court of Appeals. That court affirmed the judgment of the district court. Fairport now files this petition, requesting that this Court issue a writ of certiorari to review the judgment of the Sixth Circuit for the reasons contained herein.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This Court must issue a writ of certiorari to the Sixth Circuit to resolve the conflict among the circuits regarding the test for abandonment to be used when determining the operation of the ASA. This "abandonment" definition directly affects the applicability of the ASA to admiralty claims advanced against wrecks to which the ASA could apply. The ASA's applicability, in turn has a major impact on the operation of federal admiralty jurisdiction. The circuits have spilt over the definition of abandonment, thus leading to confusion among the circuits as to the meaning of abandonment in the ASA and the non-uniform exercise of federal admiralty jurisdiction over marine salvage claims.

This case involves the application of the ASA to a vessel located at the bottom of Lake Michigan. The ASA vests title to certain shipwrecks in the United States, 43 U.S.C 2105(a), and then transfers that title to the state on whose bottomland the wreck lies, 43 U.S.C. 2105(c).

Because the ASA gives the state ownership of a vessel within the statute's purview, the state then becomes a party to any federal litigation adjudicating a salvager's rights in that vessel. The state's becoming a party to federal litigation, in turn, implicates the Eleventh Amendment. As the Sixth Circuit pointed out in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel known as the Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), a majority of circuits has held that if the state makes a "colorable claim" that the ASA applies to a shipwreck under litigation, then the Eleventh Amendment divests the federal court of subject matter jurisdiction. *Fairport*, 105 F.3d at 1083.

As a threshold matter, for the ASA to apply to a vessel, the vessel in question must have been abandoned. 43

U.S.C. 2105(a). Thus, the state's making a "colorable claim" to the vessel and successfully invoking the Eleventh Amendment always must turn, as an initial matter, on the state's proving that the vessel was indeed abandoned.[1] However, as the following discussion points out, "abandonment" is a concept that lends itself to two separate definitions, and the circuits have split over which definition of abandonment to apply when adjudicating rights to shipwrecked vessels. Given the major effect the ASA has on the exercise of federal admiralty jurisdiction, given the central importance of the definition of abandonment to the operation of the ASA, and given that the circuits have split on this vitally important definition, it is imperative that this Court issue a writ of certiorari to the Sixth Circuit to provide a uniform definition of abandonment for the federal courts to apply.

Since 1992, the Fourth, Ninth, and Sixth circuits have issued judgments dealing with defining abandonment of sunken shipwrecks: *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992)

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[1] Both the Ninth Circuit and the Sixth Circuit have rejected contentions that a state need only advance a claim under the ASA to receive the immunity protection of the Eleventh Amendment. As the Ninth Circuit said:

> [I]n addressing the question[] of abandonment, . . . a federal court does not adjudicate the state's rights. . . . . [A] federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment.

*Brother Jonathan*, 102 F.3d 387.

The Sixth Circuit adopted the Ninth Circuit's reasoning on this point in whole. *See Fairport*, 105 F.3d at 1084.

("*Columbus-America*"); *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996) ("*Brother Jonathan*"); and *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known As The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997) ("*Fairport*"). The Fourth Circuit has adopted a rule requiring the burdened party to prove abandonment by producing evidence of a positive, affirmative act of abandonment. This "express abandonment" rule is in direct conflict the Sixth and the Ninth Circuit's rule not requiring an express renunciation of title, but rather allowing the court to infer abandonment, and thus apply the ASA, from circumstantial evidence alone.

A. The Fourth Circuit requires an express renunciation of title from the owner before finding that a sunken shipwreck has been abandoned.

*Columbus-America* involved the wreck of the S.S. Central America, a ship heavily laden with gold, which sank in the Atlantic Ocean in 1857. Various insurance companies had paid off for the loss and, after Columbus-America had discovered the wreck, those insurers were claiming title to the wreck and the gold through subrogation. Columbus-America asked the district court to hold that the wreck belonged to them under the maritime law of finds. The district court ruled that the insurance companies had abandoned their interest in the wreck due to the passage of time and the insurers' deliberate destruction of documents between the sinking and the attempted salvage. The Fourth Circuit reversed, holding that mere passage of time, even over 100 years, was not sufficient to support a finding that the companies had abandoned their rights in the wreck. Rather, the Fourth Circuit adopted the "express abandonment" rule, where an

owner can abandon his interest in a sunken wreck only by a positive, affirmative act:

> [W]hen a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved by clear and convincing evidence. Here, we are unable to find the requisite evidence that could lead a court to conclude that the underwriters *affirmatively* abandoned their interest in the gold.

*Columbus-America*, 974 F.2d at 467-68 (emphasis added).

Under the Fourth Circuit test, it is possible to infer abandonment of shipwrecks, but only if the wreck is "ancient" and the owners are nowhere to be found:

> Should the property encompass an ancient and longlost shipwreck, a court may infer abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case . . . an abandonment would have to be proved by strong and convincing evidence.

*Columbus-America*, 974 F.2d at 464-65.

It is important to note here that the Fourth Circuit did not decide *Columbus-America* under the ASA; rather, the Fourth Circuit used the definition of abandonment as incorporated in the maritime law of finds. It is important to note this distinction because one basis for the Sixth Circuit's

distinguishing *Columbus America* from *Fairport* was that *Columbus America* was not a case decided under the ASA. However, there is no basis for that distinction. The ASA does not define "abandonment." *See* 43 U.S.C. 2102(a)-(f). Because Congress chose not to provide a definition of "abandoned" in the ASA, it is reasonable to assume that "Congress presumably intended that the courts apply the definition of abandonment that has evolved under maritime law." *Brother Jonathan*, 102 F.3d at 387. Therefore, it is reasonable to state that the Fourth Circuit's definition of abandonment conflicts with the Sixth and Ninth Circuit's definition of abandonment even though the Sixth and Ninth Circuit were interpreting the ASA and the Fourth Circuit was applying the law of salvage and finds.

B. The Ninth Circuit rejected the "express abandonment" rule of the Fourth Circuit and allowed a finding of abandonment based on circumstantial evidence alone.

The Ninth Circuit confronted the question of abandonment of a shipwrecked vessel *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996). The procedural posture of *Brother Jonathan* is similar to the procedural posture of Fairport's case here. In *Brother Jonathan*, the state of California intervened in a federal maritime *in rem* action by Deep Sea Research (DSR) against the *Brother Jonathan*. California claimed title to the wreck under the ASA and moved to dismiss DSR's action under the Eleventh Amendment. The district court did not grant California's motion to dismiss, reasoning that California had not made a colorable claim under the ASA because the state had not shown that the Brother Jonathan was abandoned. In other words, the state failed to show that the ASA applied.

Initially, the district court analyzed the abandonment under the Fourth Circuit's express abandonment rule:

> [California's] testimony, by itself, does not provide a sufficient basis for the court to conclude that the owners of the Brother Jonathan have taken a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership in the Brother Jonathan and its cargo.

*Brother Jonathan*, 102 F.3d at 388 (quoting district court opinion).

However, the district court then clearly departed from the express abandonment rule and analyzed abandonment by circumstantial evidence:

> [California] has failed to provide sufficient evidence to demonstrate that the Brother Jonathan has been abandoned due to the lapse of time or because the owners failed to undertake salvage efforts.

*Brother Jonathan*, 102 F.3d 388 (quoting district court opinion) (emphasized in the original).

The Ninth Circuit, in affirming the district court's refusal to dismiss under the Eleventh Amendment, clearly recognized and upheld the district court's use of the inferential abandonment test:

> Although the district court in this case cites the Fourth Circuit decision in *Columbus-American*, its holding that the *Brother*

> *Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners.

*Brother Jonathan*, 102 F.3d at 388 (emphasis in the original).

C. The Sixth Circuit adopted the rule of the Ninth Circuit and rejected the express abandonment rule of the Fourth Circuit.

With *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known As The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), the Sixth Circuit has become the third circuit in 4 years to grapple with the question of what constitutes abandonment of a sunken shipwreck. This case, as with the *Brother Jonathan* in the Ninth Circuit, involved the application of the ASA. Clearly, at the district court level, the trial judge adopted the inferred abandonment rule. *Fairport*, 105 F.3d at 1081. On appeal, Fairport asked the Sixth Circuit to examine the abandonment test used by the district court and apply instead the Fourth Circuit's rule of express abandonment. The Sixth Circuit initially discussed the stark contrast between the rule of the Fourth Circuit and the rule of the Ninth Circuit regarding abandonment, and then it cast its lot with the Ninth Circuit's inferential abandonment test:

> [T]wo recent cases articulate the conflicting views on what is required to make an adequate showing [of abandonment] . The first is the *Brother Jonathan* . . . . A very different definition of "abandoned" is found in *Columbus-American Discovery Group* . . . . This court will follow the lead of *Brother*

> *Jonathan* rather than that of *Columbus-America*.

*Fairport*, 105 F.3d at 1084 - 85.

The Sixth Circuit has clearly adopted the inferential abandonment rule of the Ninth Circuit and rejected the express abandonment rule of the Fourth Circuit. Thus, there is a split among the circuits as to what constitutes "abandonment" of a sunken shipwreck.

D. Summary

The Abandoned Shipwreck Acts has a profound effect on a federal court's admiralty jurisdiction. It acts to divest a federal court of jurisdiction in all cases where a marine salvager presents a claim involving a wreck to which the ASA applies. Because the ASA so profoundly affects a federal court's admiralty jurisdiction, it is important for the uniform operation of federal law that all federal courts apply the ASA consistently. Thus, all federal courts must use the same standards when determining if the ASA applies to a wreck under litigation. Since that determination depends in the first instance on the definition of "abandonment" within the meaning of the ASA, it is therefore imperative that all federal courts have a uniform definition of abandonment from which to proceed.

Applying 43 U.S.C. 2105(a) determines if the ASA will apply to a specific wreck. Congress, in 43 U.S.C. 2102, saw fit to supply a definition for every single term of 43 U.S.C. 2105(a) that could possibly be ambiguous. Congress defined "embedded," 43 U.S.C. 2102(a); "National Register," 43 U.S.C. 2102(b); "public lands, " 43 U.S.C. 2102(c); "shipwreck," 43 U.S.C. 2102(d); and "submerged lands," 43

U.S.C. 2102(f). Congress even defined "State," 43 U.S.C. 2102(e). The only term of 43 U.S.C. 2105(a) that Congress did not define was "abandoned." Because Congress failed to provide the definition of abandonment, the Circuits have, as shown above, split on its definition. This split is detrimental to the uniform exercise of federal admiralty jurisdiction and the uniform application of federal admiralty law.

## CONCLUSION

For the reasons discussed above, this Court should grant Fairport's petition and issue a writ of certiorari to the United States Sixth Circuit Court of Appeals for the purposes of (1) reviewing that court's definition of abandonment under the Abandoned Shipwrecks Act and (2) promulgating a uniform, consistent rule regarding the test for abandonment, a test crucial to the uniform exercise of federal admiralty jurisdiction.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAIRPORT INTERNATIONAL
EXPLORATION, INC.

Plaintiff-Appellant,

v.

CIVIL ACTION
No. 95-1783

THE SHIPWRECKED VESSEL, known
as The CAPTAIN LAWRENCE, which
sank in 1933, her engines, tackle,
appurtenances, and cargo located
within two nautical miles of a point
at coordinates 45 degrees 32' North
Latitude and 86 degrees 40' West Longitude

in rem,

Defendant-Appellee

THE STATE OF MICHIGAN,

Intervenor-Appellee

---

Before: JONES, RYAN, and MOORE, Circuit Judges.

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**ORDER OF COURT**

Entered: March 7, 1997

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

Entered by Order of the Court

/s/ _____

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FAIRPORT INTERNATIONAL
EXPLORATION, INC.

Plaintiff-Appellant,

v.

CIVIL ACTION
No.95-1783

THE SHIPWRECKED VESSEL, known
as The CAPTAIN LAWRENCE

in rem,

Defendant-Appellee

THE STATE OF MICHIGAN,

Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: JONES, RYAN, and MOORE, Circuit Judges. Jan 30, 1997

RYAN, Circuit Judge. The plaintiff, Fairport International Exploration, Inc., filed an *in rem* admiralty action seeking

salvage rights against *The Captain Lawrence*, a vessel that sank in Lake Michigan in 1933. The State of Michigan intervened under, *inter alia*, the Abandoned Shipwreck Act of 1987 (the ASA), 43 U.S.C. §§ 2101-2106, and filed a motion to dismiss. Fairport appeals from the district court's grant of that motion, arguing that the district court erred in concluding that *The Captain Lawrence* had been abandoned. For the reasons that follow, we will affirm.

## I.

*The Captain Lawrence*, rebuilt from a yacht originally constructed in 1898, first sank in Lake Michigan in 1931. It was towed into shallow water of a Milwaukee, Wisconsin river and sold for $150 to Wilfred H. Behrens. Behrens apparently did what needed to be done to make *The Captain Lawrence* seaworthy, and the ship departed Milwaukee for Summer Island, Michigan, in August 1933, with Behrens as Captain and a crew of four.

According to a Record of Casualties to vessels filed by Behrens in November 1933, *The Captain Lawrence* became stranded near Poverty Island, Michigan, on September 19, 1933, and then sank after a "terrific wind came up" and blew the vessel onto some rocks. *The Captain Lawrence* was contacted by the Coast Guard the next morning, but declined offers of assistance. In the Record of Casualties, Behrens declared the estimated value of the total loss to be $200, and reported that the vessel was carrying no cargo. Testimony in the district court regarding the value of vessels in the 1930's indicated that comparable vessels, when new, would have sold for $14,500.

In arguing on appeal that Behrens and his descendants did not "abandon" *The Captain Lawrence* after this incident, Fairport's brief claims that

> Wilfred Behrens, owner and master of the *Captain Lawrence*, evidenced the desire and intention to salvage the vessel, building a cabin on Poverty Island and staying there for some time in the hope of salvaging the vessel . . . but, because of the loss of the ship and his equipment and strained financial circumstances, was unable to do so.

The transcript page cited by Fairport fails to support this version of events, as it simply recounts the following:

> There was an account that after the *Captain Lawrence* was wrecked they stayed in a log cabin, and we went and found one and there was portions of the wreckage that they had used the door off the *captain Lawrence* that they hauled ashore, a roof on this log cabin, and they stayed there until they could get sufficient help to get off the island.

To the extent this testimony suggests anything about Behrens's motive for staying in a log cabin, it suggests that he did so simply as a temporary means of finding shelter after the ship went down; it certainly does *not* suggest that the crew "stay[ed] there for some time in the hope of salvaging the vessel," and if anything, it contradicts that assertion. Further, we find nothing in our independent consideration of the record that could support Fairport's claim that Behrens "evidenced the desire and intention to salvage the vessel."

Steven Libert, the president of plaintiff Fairport, has a self-proclaimed obsession with "the legend of a Civil War era gold treasure allegedly lost in northern Lake Michigan in the

vicinity of Poverty Island." His research on the subject led him to conclude that *The Captain Lawrence* had been searching for the legendary treasure at the time of the shipwreck, and he hypothesized that the ship was "an important key" to locating the gold. As a result, Libert has been diving intermittently in the Poverty Island vicinity since 1983. He has found two items that he believes belong to *The Captain Lawrence*: an anchor and a propeller blade.

Fairport asserts title to the wreck of *The Captain Lawrence* based on its execution of a Salvage Bill of Sale with Gladys Nally, a surviving heir of Behrens who, in turn, is the assignee of the interests of all the other surviving heirs. Fairport filed this *in rem* admiralty action in June 1994, seeking to perfect its title to and salvage rights in the wreck.

The State of Michigan intervened and moved to dismiss in August 1994, arguing that the wreck belonged to Michigan under the ASA. Under the ASA, the federal government asserts title to certain historic wrecks, and then transfers title to the state on whose submerged lands the wrecks are found, 43 U.S.C. § 2105. A shipwreck meets the requirements of the ASA if it is (1) abandoned; (2) located on the state's submerged lands; and (3) either embedded in the sea floor or eligible for listing in the National Register of Historic Places. Michigan argued that the wreck met the requirements of the ASA, and that the district court accordingly lacked subject matter jurisdiction over Fairport's claim; that is, the suit was in reality against the State of Michigan and thus barred by the Eleventh Amendment.

Although initially noting its "very serious reservations as to whether Plaintiff has in fact found any evidence of the *Captain Lawrence*, the district court assumed for purposes of its analysis that the "evidence [was] sufficient to identify the *res*." Concluding that the second and third prongs of the ASA claim were satisfied because the vessel asserted to be *The*

*Captain Lawrence* was embedded in the sea floor of Michigan's submerged lands, the district court then reasoned that "in order to show that the ASA applies, the State has the burden of showing by a preponderance of the evidence that the vessel was abandoned." Such proof would give rise to the conclusion that Michigan had a "colorable claim" within the meaning of the ASA, thus divesting the district court of jurisdiction. The court concluded that *The Captain Lawrence* had in fact been abandoned:

> The evidence, although circumstantial, clearly demonstrates Wilfred Behrens' intent to abandon the vessel. He valued the vessel at only $200, had no insurance on it, and wrote it off as a "total loss." Had he wanted to salvage the vessel, the best time would have been immediately after the wreck. The evidence shows that Behrens was offered assistance from the Coast Guard immediately after the storm, but declined it. The evidence shows that Behrens was an experienced salvager, and continued his salvage diving for over ten years after the shipwreck. Yet there is no evidence that he ever attempted to salvage the Captain Lawrence in the years after the wreck.
>
> Behrens did not discuss the location of the Captain Lawrence with his family. He died intestate. He did not leave his interest in the vessel to his family or to anyone else. There is no evidence that his crew showed any interest in returning to the Captain Lawrence. Behrens' family did not seek out salvage divers to help locate the remains of the Captain Lawrence.

> They showed no interest in finding the Captain Lawrence until Libert told them of the possibility of a link between the Captain Lawrence and the legendary gold treasure.

Based on these facts, the court concluded that Michigan had "met its burden of showing by a preponderance of the evidence that the *captain Lawrence* was abandoned by Wilfred Behrens.

From the judgment of dismissal, Fairport filed this timely appeal.

## II.

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), the district court may look beyond the jurisdictional allegations in the complaint and consider whatever evidence is submitted. *See Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). We then consider *de novo* the district court's legal conclusion that it lacked subject matter jurisdiction. *See United States v. Moncini*, 882 F.2d 401, 403 (9th Cir. 1989). Likewise, the question of whether Eleventh Amendment immunity applies is a question of law, the determination of which we review *de novo*. *See Williams v. Commonwealth of Kentucky*, 24 F.3d 1526, 1543 (6th Cir. 1994). Whether a vessel has been abandoned, however, is a question of fact, to be reviewed for clear error only. *See Deep Sea Research v. The Brother Jonathan*, 89 F.3d 680, 684, 688 (9th Cir. 1996).

## III.

### A.

The ASA provides that "States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands," including "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101(a) & (b). To implement these Congressional findings, the statute provides that the "United States asserts title to any abandoned shipwreck that is . . . embedded in submerged lands of a State," as well as to certain other categories of shipwrecks not implicated here. 43 U.S.C. § 2105(a). The ASA then provides for a transfer of title from the United States to the individual state "in or on whose submerged lands the shipwreck is located." 43 U.S.C. § 2105(c). Finally, the statute provides, "[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies," 43 U.S.C. § 2106(a), although "the laws of the United States relating to shipwrecks" shall continue to apply in cases involving wrecks that do not meet the requirements of the ASA, 43 U.S.C. § 2106(b).

### B.

The foregoing provisions of the ASA have been interpreted as divesting federal courts of admiralty jurisdiction over claims to embedded shipwrecks, and concurrently vesting state courts with jurisdiction over such claims, contrary to the provisions of Article III that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1; *see Zych v.*

*Unidentified, Wrecked, and Abandoned Vessel, believed to be The Seabird*, 941 F.2d 525, 533 (7th Cir. 1991)(*"Seabird I"*). This divestiture is analytically accomplished through the application of the Eleventh Amendment, as it is well-settled that when the Eleventh Amendment applies to bar a suit against a state, federal courts are divested of subject matter jurisdiction. *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 848 (6th Cir. 1988).

Fairport first argues that the Eleventh Amendment does not bar its suit because the primary purpose of the Element Amendment is to avoid having money judgments rendered against states, and its suit does not seek a monetary judgment against Michigan. We may readily dispose of this argument.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The amendment presupposes "first, that each state is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1122 (1996)(internal quotation marks, brackets, and citations omitted). The Amendment embodies two distinct purposes:

> Adoption of the Amendment responded most immediately to the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." More pervasively, current Eleventh Amendment jurisprudence

> emphasizes the integrity retained by each state in our federal system[.]

*Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 400 (1994)(citations and footnote omitted).

"[T]he Court has held that the Amendment bars suits in admiralty against the states, even though such suits are not, strictly speaking, 'suits in law or equity.'" *Welch v. Texas Dep't. of Highways & Pub. Transp.*, 483 U.S. 468, 472-73 (1987)(citing, *inter alia*, *Ex parte New York, No. 2*, 256 U.S. 503 (1921). As the *Welch* Court observed, "to permit a creditor to seize and sell a government-owned vessel . . . would permit him in some degree to destroy the government itself." *Id.* at 489 (internal quotation marks, brackets, and citations omitted). Thus, "[a] judgment declaring that the state possesses no interest in particular property is a judgment 'against one of the United States' for constitutional purposes." *Zych v. Wrecked Vessel Believed to be The "Lady Elgin"*, 960 F.2d 665, 669 (7th Cir. 1992)(*Lady Elgin*).

Finally, we note that the majority of those few intermediate courts of appeal that have had occasion to apply the ASA have held that the Eleventh Amendment bars such a suit as this when a state has a claim pursuant to the ASA. *See Zych v. Unidentified, Wrecked, and Abandoned Vessel, Believed to be The Seabird*, 19 F.3d 1136, 1141 (7th Cir. 1994)(*"Seabird II"*); *Lady Elgin*, 960 F.2d at 669. *But see Sinda Expedition , Inc. v. Wrecked and Abandoned Vessel Known as "The Sinda"*, 895 F.2d 116, 119-20 (3d Cir. 1990). We now join them, finding Fairport's initial argument to be without merit.

## C.

Accepting, then, that the Eleventh Amendment applies to divest the federal court of subject matter jurisdiction over this case so long as the terms of the ASA are satisfied, the question becomes whether its terms are satisfied. In that regard, the sole question before us is whether *The Captain Lawrence* was "abandoned" within the meaning of the statute. That question, in turn, has two components: one, the substantive meaning of the term, and two, the proper burden of proof.

Fairport's arguments focus on the preliminary question. Fairport contends that the district court erred in determining that the vessel was abandoned because abandonment cannot be shown in the absence of strong and convincing evidence, such as the owner's express declaration of abandonment, and because the circumstantial evidence relied on was weak. Michigan, in turn, argues that the district court applied the incorrect burden of proof. The district court, it asserts, should have engaged only in a cursory review of the merits to determine if Michigan's claim was colorable, because it is the existence of the claim, not its strength, that is significant. It contends that because it owns the lands beneath its territorial water, and because the ASA transfers to states title to abandoned shipwrecks embedded in state-owned lands, it necessarily has stated a "colorable claim."

### 1.

We will address the latter argument first. The State of California, in *Brother Jonathan*, argued, just as Michigan does here, "that it need not demonstrate by a preponderance of the evidence that the wreck of the *Brother Jonathan* meets

the requirements of the ASA in order to make a colorable claim of ownership and qualify for Eleventh Amendment immunity." *Brother Jonathan*, 89 F.3d at 684. California basically took the position that it simply needed to "assert" that the vessel was on its submerged lands, and that it held title to abandoned shipwrecks on those lands. *Id.* at 685. The state contented that the Eleventh Amendment "limits the showing required to make a colorable claim to ownership of an abandoned shipwreck." *Id.* Otherwise, it reasoned, if it actually had to prove the merits of its claim, then it would effectively be robbed of immunity. *Id.* at 685-86. The court rejected this argument:

> [A] federal court has both the power and the duty to determine whether a case falls within its subject matter jurisdiction. Therefore, it was appropriate for the district court to require the State to present evidence that the ASA applied to the *Brother Jonathan, i.e.*, that it was abandoned and either embedded or eligible for listing in the National Register, before dismissing the case. *Otherwise, as DSR points out, the State could receive immunity simply by asserting that it was entitled to it. For a federal court to renounce jurisdiction over an admiralty case on the basis of a mere assertion of entitlement to immunity on the part of the State is inconsistent with the court's duty to assess whether it has jurisdiction.*

*Id.* at 686 (emphasis added)(citations omitted). The court also reasoned that "Eleventh Amendment immunity . . . should be treated as an 'affirmative defense,' which must be proved by

the party that asserts it and would benefit from its acceptance.'" *Id.* at 687 (citations omitted). In closing, the court noted that

> in addressing the question of abandonment, embeddedness, and historical significance of the wreck under the ASA, a federal court does not adjudicate the state's rights. The ASA does not vest title to wrecks that satisfy its requirements directly in the state. Rather, it provides that the *federal* government may assert title to such wrecks. Only after the federal government takes title to the abandoned shipwreck may title then be transferred to the state. Thus, a federal court may adjudicate the question of whether a wreck meets the requirements of the ASA without implicating the Eleventh Amendment. Therefore, we hold that the district court did not err in requiring the State to prove by a preponderance of the evidence that it was entitled to Eleventh Amendment immunity.

*Id.* at 687-88 (citations omitted).

We agree with the reasoning of *Brother Jonathan*, and find Michigan's argument, essentially that it should not have to prove abandonment at all, unpersuasive. *Brother Jonathan* provides an excellent analysis of why it is appropriate to require a state to prove the claimed lack of subject matter jurisdiction; indeed, any other rule would tie the hands of the federal court, and turn over jurisdictional determinations to the parties. Michigan points to no case in any other context where a court has simply accepted a state's assertion of Eleventh Amendment immunity, nor does it

provide any rationale for why the admiralty context should yield a unique Eleventh Amendment jurisprudence.

**2.**

We turn now to Fairport's argument that the district court clearly erred in finding that *The Captain Lawrence* had been abandoned. The ASA does not define the term "abandoned," but two recent cases articulate the conflicting views on what is required to make an adequate showing. The first is *Brother Jonathan*, itself, decided after the district court decision in this case, but supporting its reasoning. A very different definition of "abandoned" is found in *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992).

The *Brother Jonathan* court approved the following test for abandonment:

> Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, *or when circumstances give rise to an inference that the vessel has been abandoned*; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title." . . . [The district court's] holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners.

89 F.3d at 688 (emphasis added)(citation omitted).

This reasoning accords with the vast majority of decisions that have discussed the issue. *See, e.g., United States v. Steinmetz*, 973 F.2d 212, 222-23 (3d Cir. 1992).

The opposing view is expressed in *Columbus-America*. The first thing to note about *Columbus-America*, however, is that it is not an ASA case. Rather, the court engaged in a lengthy discussion of the law of salvage and the law of finds, and their conflicting policies. The law of salvage is aimed at preserving title in the original owner, allowing a salvor a right to possession and an award, but not title itself. Application of the law of finds, however, can result in the actual transfer of title to the salvor. Thomas J. Schoenbaum, 2 Admiralty & Maritime Law § 16-7 (2d ed. 1994). Abandonment can occur in either context, but because of differing results, different standards of determining abandonment are imposed. In any event, the *Columbus-America* court's interpretation of these doctrines led it to reason as follows:

> Today, finds law is applied to previously owned sunken property only when that property has been abandoned by its previous owners. Abandonment in this sense means much more than merely leaving the property, for it has long been the law that "[w]hen articles are lost at sea the title of the owner in them remains." Once an article has been lost at sea, "lapse of time and nonuse are are not sufficient, in and of themselves, to constitute an abandonment." In addition, there is no abandonment when one discovers sunken

> property and then, even after extensive efforts, is unable to locate its owner.
>
> While abandonment has been simply described as "the act of deserting property without hope of recovery or intention of returning to it," in the lost property at sea context, there is also a strong *actus* element required to prove the necessary intent. "Abandonment is said to be a voluntary act which must be proved by a clear and unmistakable affirmative act to indicate a purpose to repudiate ownership." The proof that need be shown must be "strong . . . such as the owners express declaration abandoning title."

*Columbus-America*, 974 F.2d at 461 (citations omitted). The court acknowledged, however, that "'[i]n the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property, or there may even be an express disclaimer of ownership.'" *Id.* at 462 (citation omitted).

This court will follow the lead of *Brother Jonathan* rather than that of *Columbus-America*. The approach of *Columbus-America* is premised entirely on the policy choices involving the law of salvage and the law of finds, neither of which applies under the ASA. The only question under the ASA is whether a ship has been abandoned so as to give the state a claim. Common sense makes readily apparent that the statute did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity.

We find it unnecessary to undertake an analysis of whether the *Columbus-America* court correctly interpreted

the law of salvage and finds and their varying approaches to abandonment; we simply note that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances. And here, there is no question that the district court's finding of abandonment was not clearly erroneous, as there was an abundance of circumstantial evidence justifying an inference of abandonment. In fact, apart from its argument that there must be a showing of express abandonment, the only support Fairport offers for its position is its completely unsubstantiated claims about Behrens's salvage attempts. In short, Fairport has not shown that the district court's conclusion was clearly erroneous.

## IV.

The district court's judgment is **AFFIRMED.**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FAIRPORT INTERNATIONAL
EXPLORATION, INC.

Plaintiff,

v.

CIVILACTION
No.2:94-CV-164

THE SHIPWRECKED VESSEL, known as The CAPTAIN LAWRENCE, which sank in 1933, her engines, tackle, appurtenances, and cargo located within two nautical miles of a point at coordinates 45 degrees 32' North Latitude and 86 degrees 40' West Longitude

in rem,

Defendant,

and

THE STATE OF MICHIGAN,

Intervenor.

**OPINION**

Bell, D.J. June 14, 1995

Plaintiff Fairport International Exploration, Inc. filed this admiralty in rem action in order to establish its right to salvage a shipwrecked vessel, the Captain Lawrence, which sank in the waters of Lake Michigan in 1933.

The State of Michigan has intervened in order to present its claim of title to the vessel under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. § 2101-06; the Submerged Lands Act, 43 U.S.C. § 1311 et seq.; the Aboriginal Records and Antiquities Act, M.C.L. § 299.51 et seq.; M.S.A. § 13.21 et. seq.; the Great Lakes Submerged Lands Act, M.C.L. § 322.701; M.S.A. § 13.700(1); and the exception to the common law of finds for artifacts found embedded in the land of another.

This matter is currently before the Court on the State's motion to dismiss for lack of jurisdiction. The State contends that the Court lacks subject matter jurisdiction to proceed with this matter because the State has a "colorable claim" of ownership to the Captain Lawrence by virtue of the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. § 2101 et seq., and that accordingly Fairport's in rem action against the vessel is really an action against the state which is prohibited by the Eleventh Amendment to the United States Constitution.

Under the ASA, the United States asserts title to any abandoned shipwreck that is embedded in the submerged lands of a State, embedded in coralline formations on submerged lands of a State, or on submerged lands of a State and included in or eligible for inclusion in the National Register of Historic Places. 43 U.S.C. § 2105(a). The Act further transfers title of any such abandoned shipwreck to the

State on whose submerged lands the shipwreck is located. 43 U.S.C. § 2105(c).The Eleventh Amendment prohibits a federal district court from declaring that a claimant has rights superior to those of the State which asserts a colorable claim of interest in a shipwreck. See e.g., Zych v. Unidentified, Abandoned, and Wrecked Vessel Believed to be SB "Lady Elgin", 960 F.2d 665, 670 (7th Cir.), cert. denied, 113 S. Ct. 491 (1992); Sinda Expedition, Inc. v. Wrecked and Abandoned Vessel Known as "The Sinda", 895 F.2d 116, 122 (3rd Cir. 1990); Fitzgerald v. Unidentified Wrecked and Abandoned Vessel, 866 F.2d 16, 17 (1st Cir. 1989).

In the order scheduling the hearing the Court required the State to carry the burden of proof by a preponderance of the evidence as to abandonment. The State contests its burden of proof on this motion. The State Contends that it does not need to prove abandonment in order to be entitled to dismissal, but need only show it has a "colorable claim" to the res. If it shows its has a colorable claim to the res, then the Eleventh Amendment precludes this Court from adjudicating the State's interest in the property.

The "colorable claim" language stems from the plurality opinion of the Supreme Court in Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982). In Treasure Salvors, a case involving an abandoned ship in international waters, four justices held that the Eleventh Amendment was no bar to the action against the State because the State had no "colorable interest" in the wreck.

Since Treasure Salvors, courts have applied, without defining, the "colorable interest" test. See, e.g., Marx v. Government of Guam, 866 F.2d 294, 300-301 (9th Cir. 1989); Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked , and Abandoned Sailing Vessel, The "Whidah", 717 F.2d 6, 7-8 (1st Cir. 1983); and Subaqueous Exploration and Archeology, Ltd. v. Unidentified, Wrecked, and Abandoned

Vessel, 577 F.Supp. 597, 607 (D. Md. 1983), aff'd 765 F.2d 139 (4th Cir. 1985). The State relies on these cases for the proposition that it need merely come forward with a "colorable claim" of interest in the res to defeat jurisdiction, and further, that a "colorable claim" is nothing more that a claim advanced by a state based on presumptively valid state and federal statutes.

The State's reliance on these cases for its second contention, i.e., that it need merely rely on the ASA to show it has a colorable claim, is misplaced. All of the cases relied on involved undisputedly abandoned shipwrecks. When a shipwreck is abandoned there is no question that the ASA itself gives the state a colorable claim to the property. But where, as here, there is no agreement that the shipwreck is abandoned, the state must do more than invoke the ASA to show a "colorable interest."

In Deep Sea Research, Inc. v. The Brother Jonathan, --- F.Supp. ---, 1995 WL 233135 (N.D. Cal. Mar. 15, 1995), the State of California filed a motion to dismiss an admiralty in rem action against the wreck of the S.S. Brother Jonathan on the basis of the ASA. The court held that to establish the existence of a "colorable claim" to the shipwreck under the ASA, "the State must establish, by a preponderance of the evidence, that the ASA applies to the vessel at issue." Id. at *3. See also ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1291-92 (9th Cir. 1993).

If the State bears its burden of showing by a preponderance of the evidence that the Captain Lawrence has been abandoned and is embedded in the submerged lands of the state, then the State would have a "colorable claim" to the Captain Lawrence under the ASA and the Court would be divested of jurisdiction to adjudicate the merits of the State's claim.

The Court's first responsibility, therefore, is to determine whether the ASA applies - i.e., whether the vessel has been abandoned. As noted in Zych v. The Seabird, 811 F.Supp. 1300, 1312 n. 9 (N.D. Ill. 1992):

> Upon taking jurisdiction over the case, the federal court's first responsibility would be to determine whether or not the wreck has been abandoned because the resolution of that question determines whether or not the federal court has jurisdiction. Presumably, the ASA does not affect the federal court's jurisdiction to resolve questions relating to its jurisdiction.

In order to determine whether this Court has subject matter jurisdiction over this case, an evidentiary hearing was held on April 12 and 13, 1995, on the issue of abandonment. The Court makes the following findings of fact:

## Findings of Fact

The Alice, a two-masted schooner yacht, was built in 1898. In 1919, the vessel was rebuilt as a "gas screw" yacht, with a gasoline-powered internal combustion engine. The vessel was sold to the Milwaukee County Council, Boy Scouts of America, in 1924 for use as a training ship for sea scouts and was renamed the Captain Lawrence.

The Captain Lawrence sank in deep water in 1931. The vessel was towed into the shallow water of the Menominee River in Milwaukee where she lay for some time. In May 1932 the Boy Scouts sold the vessel to Wilfred H. Behrens of Milwaukee, Wisconsin for $150.00.

On August 26, 1933, the Captain Lawrence departed Milwaukee, Wisconsin bound for Summer Island for an

amateur diving expedition. She was captained by Wilfred Behrens and had a crew of four. The Captain Lawrence was shipwrecked on September 19, 1933.

Wilfred Behrens filed a Record of Casualties to Vessels on November 2, 1933, to report the occurrence at 3:00 a.m. Tuesday, September 19, 1933. In that report he described the nature of the casualty as a stranding, caused when "[a] terrific wind came up while in shelter and threw the vessel onto the beach." (Exh. F). He further reported that the propeller shaft broke and the vessel was blown on the rocks. (Exh. F). He reported that no assistance was rendered, but that the Coast Guard rang them up in the morning after they found out about the wreck and asked whether they needed assistance. (Exh. F).

In the Record of Casualties Wilfred Behrens estimated the value of the vessel to be $200.00. He reported that it was carrying no cargo, and estimated the loss or damage to the vessel at "$200.00. Total loss." He reported that there was no insurance on either the vessel or the cargo. The precise location on Poverty island where the wreck occurred was not stated.

An undated newspaper photograph of the Captain Lawrence was captioned "Schooner Pounded to Pieces." The picture was apparently taken before the shipwreck. (Exh. 9).

Wilfred Behrens' daughters, Alice Behrens Bergmans and Gladys Nally, testified that Wilfred Behrens was a salvage diver and ran a tire capping business. Because SCUBA was not available when he was diving, he wore heavy boots and a hard hat connected to an oxygen hose. They recalled that he would go up north on diving expeditions, that he would often talk about sunken treasure, and that he was concerned about getting funds to finance an expedition. He continued to dive through the mid-1940's, but he never had another boat

worthy of the lake waters around Poverty Island. Most of his diving was in rivers. Wilfred Behrens died intestate in 1959.

Steven Libert, President of Fairport International Exploration, Inc., has been interested in the legend of a Civil War era gold treasure allegedly lost in northern Lake Michigan in the vicinity of Poverty Island since 1978. This interest has become his obsession. Many accounts of the legend make reference to a vessel named the St. Lawrence that recovered the gold in the 1930's, and then sank off the shores of Poverty Island.

Through his research, Libert determined that references to the St. Lawrence were in fact references to the Captain Lawrence. Having made this connection, Libert was able to locate the heirs of the Captain Lawrence and to concentrate his search on a more limited area. Libert believes that the Captain Lawrence is an important key to locating the legendary gold treasure. He believes the Captain Lawrence was searching for the legendary gold treasure at the time of the shipwreck, and might have one chest of gold on it. The ship log might also contain information regarding the treasure.

Libert has been diving around Poverty Island since 1983. He has identified a debris scatter in 40-60 feet of water, adjacent to the shore of Poverty Island, which includes planks, a cable, barrels, and several areas of magnetic declination. In 1984 he found an anchor. In 1985 he located a propeller blade wedged in the rocks off the north shore of Poverty Island. The propeller blade was located 150 feet from the gravel beach on the north side of the island. Libert is certain these objects belong to the Captain Lawrence.

Wilfred Behrens' family has not been able to provide Libert much information because Wilfred Behrens was secretive about what he was doing up north. Carl Rushie, on of Wilfred's diving partners, advised Libert that the diving equipment the Captain Lawrence included a compressor, hard

hat diving apparel, and a diving bell. A diving bell washed ashore on the north side of Big Summer island in 1942.

Libert met with State representatives in September 1993 to discuss what permits would be needed to dredge 3 to 12 feet of silt in a football field sized area. In his discussions with the State Representatives, Libert described his activity as a search for the legendary chests of gold. He said little, if anything about salvaging the Captain Lawrence.

In 1994, John Halsey, State Archeologist with the Bureau of History, Michigan Department of State, dove in the area identified by Libert as the site of the Captain Lawrence. The visibility around the area was only 5 to 10 feet and silt was easily stirred up, reducing visibility to 0 feet. Halsey observed scattered wooden planks, bricks, a tire, cable, crushed barrels, pails, a metal strainer from a gas engine, and a hanging knee. Most of the observable cultural materials were embedded within the bottom sediments.

The anchor removed from the area by Libert in 1985 is consistent with what might have been used on the Captain Lawrence, but it is not distinctive. Similar anchors were in common usage for 100 years, and it is not unusual to find an anchor even where there has been no shipwreck.

The propeller blade is consistent with a ship from the 1930's, but it cannot be identified as belonging to the Captain Lawrence. Moreover, the Record of Casualties reports a broken propeller shaft rather than a broken propeller blade.

The artifacts as a whole are generally consistent with a vessel the size and age of the Captain Lawrence, but there is nothing unique to the Captain Lawrence that could be used to positively identify the remains as those of the Captain Lawrence.

The State does not consider any of the artifacts to be significant for purposes of the National Register of Historic Places. The criteria for listing on the National Register of

Historic Places is that the object be unique, a good specimen, or associated with an event of historic significance. Even if the artifacts are from the Captain Lawrence, the Captain Lawrence was a typical yacht from the turn of the century, it is not a good specimen, and the State does not believe that it is associated with an event of historic significance.

Kenneth R. Pott, Curator of the Michigan Maritime Museum testified that maritime traffic in the Poverty Island area was heavy in the mid to late 1800'a and early 1900's. The waters around Poverty Island were not a safe area for navigation and there were historical accounts of two shipwrecks in the Poverty Island area in the late 1800's and may have been the site of other unrecorded wrecks. There are also historical records of many wrecks off of nearby Summer Island.

Because the debris is not distinctive, none of the evidence can be positively identified as coming from the Captain Lawrence. Moreover, because other boats were recorded to have gone down in the area, it cannot be said with any degree of certainty that the debris came from only one vessel.

In 1994, all of the surviving heirs of Wilfred Behrens assigned their interests to Gladys Nally, who in turn executed a Salvage Bill of Sale with Fairport, granting Fairport the exclusive right to salvage the remains of the Captain Lawrence.

## ANALYSIS

Based upon the evidence presented, the Court has very serious reservations as to whether Plaintiff has in fact found any evidence of the Captain Lawrence. The evidence is too sparse and generic to be able to say that it comes from

one vessel, much less to say that it comes from the specific vessel, the Captain Lawrence.

Assuming the evidence is sufficient to identify the res, the Court must consider the application of the ASA. The State does not contend that the Captain Lawrence is in a coralline formation, or that it is eligible for inclusion in the National Register. Accordingly, in order to show that the ASA applies, the State has the burden of showing by a preponderance of the evidence that the vessel was abandoned, and that it is embedded in the submerged lands of the State.

Assuming the debris is that of the Captain Lawrence, there is no question that most of it is embedded in the submerged lands of the State. Embedded is defined in the ASA as "firmly affixed in the submerged lands . . . such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." 43 U.S.C. § 2102(a).

The cultural materials observed were in large part embedded within the bottom sediments. The areas of magnetic declination tend to indicate that additional metal object may be found under the surface. Moreover, Plaintiff sought a permit to mechanically dredge 3 to 12 feet in an area the size of a football field. The Court finds no issue as to embeddedness.

The only real issue for resolution is whether the State has shown by a preponderance of the evidence that the Captain Lawrence was abandoned.

The State claims that abandonment can be inferred in this case because the property was not valuable and Behrens made no effort to salvage it. Plaintiff, on the other hand, claims that neither Behrens nor his heirs ever abandoned their interest in the Captain Lawrence, and that abandonment cannot be inferred merely from the passage of time.

The term "abandoned" is not defined in the ASA, but the statute makes clear that it applies only to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention." 43 U.S.C. § 2101.

Under maritime salvage law, "abandonment" is defined as "the act of leaving or deserting such property by those who were in charge of it, without hope on their part of recovering it and without the intention of returning to it." Benedict on Admiralty, § 134 (7th ed. 1993).

The ASA's utilization of the term "abandoned" is consistent with the traditional interpretation of that term by courts sitting n admiralty. Zych v. Unidentified, Wrecked, & Abandoned Vessel Believed to be "SB Seabird", 811 F.Supp. 1300, 1309 (N.D. Ill. 1992), aff'd, 19 F.3d 1136 (7th Cir. 1994). The legislative history does not evince a contrary interpretation.[1]

The law is hesitant to find an abandonment, and abandonment must be proved by clear and convincing evidence. Columbus-America Discovery Group, Inc. v. Atlantic Mutual Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992), cert. denied 113 S.Ct. 1625 (U.S. 1993). Abandonment cannot be merely presumed from the passage of time. Zych v. Unidentified, Wrecked, & Abandoned Vessel, Believed to be SB "Lady Elgin", 755 F.Supp. 213 (N.D. Ill. 1991), vacated,

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[1] The House of Representatives Committee on Interior and Insular Affairs noted that the term "abandoned" as used in the Act, "does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck." H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 365, 366.

960 F.2d 665 (7th Cir.), cert. denied, 113 S.Ct.491 (U.S. 1992). Moreover, abandonment should not be inferred where there has been no realistic opportunity to discover and salvage the property. Id. at 216. Abandonment may, however, and often must, be determined on the basis of circumstantial evidence. Lady Elgin, 755 F.Supp. at 214.

The Lady Elgin was a steamship which sank in Lake Michigan in 1860. The vessel had been lost for over 130 years and the owner made no effort to recover it. Nevertheless, the court found no abandonment because the technology did not exist to recover the wreck until the 1980's:

> In light, however, of the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success.

755 F.Supp. at 216.

In Columbus-America the Court held that abandonment of the Central America could not be presumed due to inaction because it was not technologically feasible to salvage the vessel until recently. Id. at 461-68. The Central America went down in 1857 and was eventually located 8,000 feet below the surface and 160 miles off shore.

The Brother Jonathan sank in 1865 and is resting 250 feet below the surface. In arriving at its conclusion that the State had failed to meet its burden of showing abandonment, the court noted that the technology did not exist to either find or safely salvage the vessel until recently. In particular, the court noted that scientific advances in the area of sonar and

the use of mixed breathing gasses to combat decompression sickness had only recently made it possible to locate and dive for wrecks in deep water. The Brother Jonathan was located at 250 feet. 1995 WL 233135 at *8.

Notwithstanding Plaintiff's arguments to the contrary, the circumstances surrounding the wreck of the Captain Lawrence bear no resemblance to those of the Lady Elgin, the Columbus-America, or the Brother Jonathan. The Captain Lawrence is a relatively recent wreck. It did not sink in deep water. It was stranded on Poverty Island. Assuming the evidence Plaintiff has found is from the Captain Lawrence, the vessel is in pieces close to the shore in only 40-60 feet of water. It was not technologically unfeasible to locate or salvage the Captain Lawrence in the 1930's. Modern technology was not essential to the recovery of the vessel.

The evidence, although circumstantial, clearly demonstrates Wilfred Behrens' intent to abandon the vessel. He valued the vessel at only $200, had no insurance on it, and wrote it off as a "total loss." Had he wanted to salvage the vessel, the best time would have been immediately after the wreck. The evidence shows that Behrens was offered assistance from the Coast Guard immediately after the storm, but declined it. The evidence shows that Behrens was an experienced salvager, and continued his salvage diving for over ten years after the shipwreck. Yet there is no evidence that he ever attempted to salvage the Captain Lawrence in the years after the wreck.

Behrens did not discuss the location of the Captain Lawrence with his family. He died intestate. He did not leave his interest in the vessel to his family or to anyone else. There is no evidence that his crew showed any interest in returning to the Captain Lawrence. Behrens' family did not seek out salvage divers to help locate the remains of the Captain Lawrence. They showed no interest in finding the Captain

Lawrence until Libert told them of the possibility of a link between the Captain Lawrence and the legendary gold treasure.

The Court finds that the State has met its burden of showing by a preponderance of the evidence that the Captain Lawrence was abandoned by Wilfred Behrens. Because the State has met its burden of showing that it has a colorable claim of interest in the vessel, this Court concludes that the Eleventh Amendment bars this court from adjudicating the State's rights in this vessel, and that this action must be dismissed for lack of jurisdiction.

An order consistent with this opinion will be entered.

/s/_____

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FAIRPORT INTERNATIONAL
EXPLORATION, INC.

Plaintiff,

v.

CIVIL ACTION
No. 2:94-CV-164

THE SHIPWRECKED VESSEL, known as The CAPTAIN LAWRENCE, which sank in 1933, her engines, tackle, appurtenances, and cargo located within two nautical miles of a point at coordinates 45 degrees 32' North Latitude and 86 degrees 40' West Longitude

in rem,

and

THE STATE OF MICHIGAN,

Intervenor

**ORDER OF DISMISSAL**

Bell, D.J. June 14, 1995

In accordance with the opinion entered this date,

**IT IS HEREBY ORDERED** that Intervenor State of Michigan's motion to dismiss for lack of jurisdiction (Docket # 22) is **GRANTED**.

**IT IS FURTHER ORDERED** that Plaintiff Fairport International Exploration, Inc.'s motion for order appointing special process server (Docket #3), motion for preliminary injunction (Docket #4), and motion for order appointing substitute custodian (Docket #5) are **DENIED**.

**IT IS FURTHER ORDERED** that this action is **DISMISSED** in its entirety.

/s/ _____

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
F I L E D
AUG 29 1997
CLERK

No. 96-1936
In the Supreme Court of the United States
October Term, 1996

FAIRPORT INTERNATIONAL EXPLORATION, INC.,

Petitioner,

v.

STATE OF MICHIGAN,

and

Respondent,

THE SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, *in rem*,

Respondent.

# ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# BRIEF FOR RESPONDENT STATE OF MICHIGAN IN OPPOSITION TO PETITION

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21PP

## QUESTION PRESENTED

Whether Congress intended to require proof of express, affirmative abandonment to establish state ownership of shipwrecks under the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106.

## PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all the parties to the proceedings in the Court of Appeals for the Sixth Circuit. The Shipwrecked Vessel Known As The Captain Lawrence, although nominally a party in this *in rem* admiralty action, has never been separately represented and has not participated in any proceedings below.

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## OPINIONS BELOW

The Opinions below are set forth in *Fairport Int'l Exploration, Inc., v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. N.D. 1995), *aff'd.* 105 F.3d 1078 (6th Cir. 1997).

## BASIS OF JURISDICTION

28 U.S.C. § 1254(1) provides that this Court may issue a writ of certiorari to the court of appeals upon the petition of any party in a civil case.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. XI and the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106 have been set forth in pertinent part in the petition at pages 2-4.

## COUNTER-STATEMENT OF THE CASE

This action began with Petitioner's complaint which claimed that the district court had jurisdiction *in rem* over the alleged shipwreck of the Captain Lawrence and *in personam* over any competing claimant or salvor. Complaint, ¶ 9. Petitioner requested title to the vessel or a liberal salvage award *in specie*, and a permanent injunction preventing any third party from interfering with its exclusive right to salvage property within an area larger than 12.6 square nautical miles.

Respondent State of Michigan ("Michigan") filed its motion to intervene and its motion to dismiss the complaint for lack of jurisdiction under U.S. Const. amend. XI. The district court granted the motion to intervene and ordered an evidentiary hearing on the motion to dismiss. At the hearing, Michigan was required over its objection to prove by a preponderance of the evidence that the alleged vessel was abandoned and embedded in Lake Michigan bottomlands. Based on the evidence presented, the district court found that Michigan had proved by a preponderance of the evidence that the alleged vessel was abandoned and embedded in state-owned bottomlands. Having thus proved "a colorable claim" to the alleged vessel, Michigan's motion to dismiss under U.S. Const. amend. XI was granted. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. N.D. 1995).

The Court of Appeals for the Sixth Circuit affirmed the district court in all respects, including the requirement that Michigan prove by a preponderance of the evidence that the alleged vessel was both abandoned and embedded in state bottomlands. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997).

Petitioner's "Statement of the Case" contains some misstatements. The record indicates that Wilfred Behrens' destination in August, 1933 was Summer Island, not Poverty Island. More importantly, the record does not support the assertion that Behrens returned to Poverty Island to salvage his vessel. The district judge noted in his opinion that there was no evidence that Behrens attempted to salvage the vessel in the years after the wreck. Likewise, the court of appeals

found nothing "in [its] independent consideration of the record that could support Fairport's claim that Behrens evidenced the desire and intention to salvage the vessel." 105 F.3rd at 1080.

Petitioner further states that Steven Libert identified a propeller shaft as being from the Captain Lawrence. There is no evidence that a propeller shaft was ever recovered. Furthermore, while Libert did recover a propeller blade and an anchor which in his opinion were from the Captain Lawrence, he had no qualifications to make the identification. The district court found as follows:

> The anchor removed from the area by Libert in 1985 is consistent with what might have been used on the Captain Lawrence, but it is not distinctive. Similar anchors were in common usage for 100 years, and it is not unusual to find an anchor even where there has been no shipwreck.
>
> The propeller blade is consistent with a ship from the 1930's, but it cannot be identified as belonging to the Captain Lawrence. Moreover, the Record of Casualties reports a broken propeller shaft rather than a broken propeller blade.

913 F. Supp. at 556.

The district court relied on the following evidence in making its determinations with respect to the anchor and propeller blade: Kenneth R. Potts, Director of the Michigan Maritime Museum in Grand Haven, Michigan, testified that the anchor was not unusual and was of the "folding stock" variety, sometimes referred to as a "kedge" anchor. Potts also testified that lost anchors are often unassociated with any shipwreck. As for the propeller blade, John Althouse, a naval architect and project engineer for the Michigan Wheel Corporation, testified that the blade could not be linked to any vessel. This evidence was presented by Michigan to meet the burden of proof imposed by the district court.

## SUMMARY OF ARGUMENT

This Court should not grant certiorari on an issue which was not properly before the federal court. The issue of proofs necessary to establish abandonment of artifacts from any shipwreck in Michigan's bottomlands should have been litigated in state court. There can be no doubt that Michigan asserted a "colorable claim" to any such artifacts. That should have ended the district court's inquiry.

Rather than grant certiorari, the Court would be better advised to hold the case in abeyance until *California v. Deep Sea Research*, No. 96-1400, is decided. That case squarely presents the only constitutional issue involved in this case, *i.e.* whether Eleventh Amendment immunity is contingent upon a state proving its ownership by a preponderance of the evidence.

Requiring Michigan to prove abandonment and embeddedness by a preponderance of the evidence essentially required the proof necessary for a judgment in Michigan's favor on the merits. This was both contrary to the Amendment and a waste of judicial and litigant resources. Furthermore, the burden imposed by the courts below will in future cases inevitably frustrate the intent of Congress as expressed in the ASA. The demise of the Captain Lawrence occurred only 64 years ago. Although difficult to locate, documents pertaining to the vessel still existed. This will not be the case with shipwrecks of more remote vintage.

## ARGUMENT

### I.

### CERTIORARI SHOULD NOT BE GRANTED ON THE QUESTION PRESENTED.

This Court's *Rule 10* provides that certiorari will be granted only for "compelling reasons." In the case of conflict among the circuits, the difference must relate to an "important matter." *Rule 10(a)*. Michigan submits that the standard of proof of abandonment is not such a compelling or important matter which would warrant granting the writ in this case. The lower court's decision that Congress did not intend a test of express abandonment in the Abandoned Shipwrecks Act ("ASA"), 43 U.S.C. §§ 2101-2106, is correct as a matter of common sense, legislative history, and maritime law.

As a matter of common sense, the district court was correct in its observation that abandonment must often be determined on the basis of circumstantial evidence. As the State's administrator of regulatory programs relating to its bottomlands testified below, it is unusual for an owner of a shipwreck to actively disclaim ownership. The only motivation for an owner to proclaim abandonment is to avoid liability where the wreck presents a hazard to navigation. Historic shipwrecks do not present such a hazard.

Because abandonment is a question of fact relating to the owner's intent, it often must be established in the same manner as other factual issues involving intent in civil litigation -- by a preponderance of the evidence. Although Congress did not define the term "abandoned," the legislative history of the ASA establishes that Congress intended that the concept may be inferred from all the circumstances. In the Report of the House Committee on Interior and Insular Affairs, the Committee reported the following with respect to abandonment:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of

> ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514, 100th Cong., 2nd Sess., pt. 1, at 2 (March 14, 1988), reprinted in 1988 U.S.C.C.A.N. 365, 366.

In the Report by the House Merchant Marine and Fisheries Committee, it is noted:

> Abandoned shipwrecks within the scope of this Act include those which have been deserted and to which the owner has relinquished all ownership rights. Except in the case of U.S. warships or other public vessels (which require an affirmative act of abandonment), the act of abandonment may be implied or inferred from the circumstances of the shipwreck as when an owner has never asserted any control over or otherwise indicated a claim of possession.

H.R. Rep. No. 514, *supra*, pt. 2, at 5 (March 28, 1988), reprinted in 1988 U.S.C.C.A.N. 370, 373-374.

Congress' understanding of the concept of abandonment is consistent with the weight of authority under general maritime and common law. Whether a sunken wreck has been abandoned is a question of fact. *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198, fn. 11 (5th Cir. 1989). Abandonment may be inferred from all the relevant facts and circumstances. *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960).

No formal declaration of abandonment is necessary. Rather, abandonment may be inferred from conduct of the owner inconsistent with an intention to return to the property. Abandonment may also be inferred from the nature and situation of the property itself. *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094, fn. 5 (S.D. Tex. 1981), *aff'd. without opinion*, 698 F.2d 1215 (5th Cir. 1983). Circumstances from which abandonment may be permissibly inferred include nonuse and lapse of time coupled with the owner's failure to

act or otherwise assert any claim to the property. *Id. See also Chance v. Certain Artifacts Found & Salvaged From The Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd. without opinion*, 775 F.2d 302 (11th Cir. 1985). As stated by the district court in *Chance, supra*, "[m]odern courts, however, have rejected the salvage law theory that title to property can never be lost. They have instead applied the law of finds under the doctrine of 'animus revertendi' (the owner has no intention of returning)." 606 F. Supp. at 804. *See also, Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336 (5th Cir. 1978); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1385 (S.D. Fla. 1988); *Indian Recovery Co. v. The China*, 645 F. Supp. 141, 144 (Del. 1986); *Klein v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1513 (11th Cir. 1985).

It is thus clear what Congress intended by the term "abandoned." Furthermore, whether property has been abandoned is an issue which the state courts confront on a regular basis. The only question of constitutional significance resolved by the courts below was the Eleventh Amendment issue. The same issue is pending before this Court in *California v. Deep Sea Research, Inc.*, No. 96-1400.

If the courts below had properly proceeded in view of Michigan's Eleventh Amendment claim, the question of title to the alleged shipwreck would not have been decided in federal court. The Eleventh Amendment "bars suits in admiralty against the states, even though such suits are not, strictly speaking, 'suits in law or equity.'" *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 472-73 (1987), citing, *inter alia, Ex parte New York, No. 2*, 256 U.S. 503; 65 L. Ed. 1063; 41 S. Ct. 592 (1921). In *Ex parte New York, No. 2*, one issue was the manner in which New York was required to establish its claim to the Queen City. This Court resolved the issue as follows:

> We deem it clear, however, that the verified suggestion presented by the Attorney General of that State, in his official capacity as representative of the State and the People thereof, amounts to an official certificate concerning a public matter presumably within

> his official knowledge, and that it ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge. . . . It would be an unwarranted aspersion upon the honor of a great State to treat facts thus solemnly certified by its chief law officer, and accepted as true when passed upon by the District Court, as now requiring verification.

256 U.S. at 509-510.

It is ironic that New York's claim of title made merely on the statement of its Attorney General was deemed sufficient to create immunity from federal court jurisdiction, while in the instant case Michigan was required to prove by a preponderance of the evidence that any remains of the Captain Lawrence were abandoned and embedded in state bottomlands. To say the least, this was a heavy burden, especially where Michigan shared the district court's "very serious reservations as to whether [Petitioner] has in fact found any evidence of the Captain Lawrence." 913 F. Supp. at 557.

The district court's definition and allocation of the burden of proof of abandonment was contrary to the Eleventh Amendment. Various courts of appeal have held that the rights of a state which asserts a claim under similar circumstances cannot be adjudicated in federal court without the consent of the state. *Maritime Underwater Surveys Inc. v. The Whidah*, 717 F.2d 6, 8 (1st Cir. 1983); *Fitzgerald v. The HMS Defiance*, 866 F.2d 16, 18-19 (1st Cir. 1989); *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel*, 895 F.2d 116, 122 (3rd Cir. 1990); *Florida v. Treasure Salvors Inc.* [after remand] 689 F.2d 1254, 1256 (5th Cir. 1982); *Zych v. The Lady Elgin*, 960 F.2d 665, 670 (7th Cir. 1992); *Marx v. Guam*, 866 F.2d 294, 299 (9th Cir. 1989).

With this Court's plurality opinion as guidance, the court of appeals in *Florida v. Treasure Salvors Inc.* [after remand] recognized that the Eleventh Amendment was a bar to adjudication of Florida's ownership interest:

> The Supreme Court made it clear that resolution of the validity of the warrant "does not require

> -- *or permit* -- a determination of the state's ownership of the artifacts." *Treasure Salvors*, 458 U.S. at 699, 102 S. Ct. at 3322, 73 L. Ed. 2d at 1078 (emphasis added). Treasure Salvors' lament that, unless this case resolves the ownership issue, the result of seven years of litigation will be inconclusive is, au fond, a complaint against the eleventh amendment; the State cannot be forced to litigate a claim to ownership of property in federal court.
>
> * * *
>
> We, therefore, AFFIRM the district court's opinion insofar as it directs transfer of the artifacts to Treasure Salvors. Unless the State elects voluntarily to appear and to litigate ownership, the court shall enter final judgment in the usual form for in rem actions, decreeing Treasure Salvors to be owner of the artifacts as against all claimants except the State of Florida, but declaring expressly: "This judgment does not determine in any way whether the State of Florida is the owner of these artifacts."

689 F.2d 1254, 1255-1256 (5th Cir. 1982) [footnote omitted].

In *Sindia Expedition*, there were several competing claimants whose rights against each other (but not as against the State of New Jersey) could be adjudicated by the district court. The court in *Sindia* observed:

> Finally, the record reveals that the rights to the Sindia are contested by other parties. Thus, the effect of the proceeding will be, if the Expedition is successful, to award it possession to the Sindia as against these parties and not against the state.

895 F.2d at 121 [footnote omitted].

> New Jersey would not be adversely affected because the district court cannot make a determination of the State's right to or interest in the property without its consent. *Treasure Salvors*, 458 U.S. at 700.

895 F.2d at 122.

> As noted, New Jersey is the only potential non-party who could assert an interest in the wreck once this litigation is concluded. . . . The victorious party may have to face the State in another forum at another time.

895 F.2d at 123 [citation omitted].

In this case, the district court held that Michigan's contention that it should not have to prove abandonment was based upon cases that involved "undisputably *abandoned* shipwrecks." 913 F. Supp. at 554 [emphasis by the district court]. This is inaccurate. In *Zych v. The Lady Elgin, supra*, the plaintiff acquired unabandoned interests in the Lady Elgin in order to defeat the State of Illinois' claim. Just as in this case, the district court invited the State of Illinois to establish its claim that the Lady Elgin was indeed abandoned, and was therefore the property of that state. Illinois refused to participate in the dispute regarding abandonment before the district court. As a result, the district court concluded that Illinois' "standoffishness" waived its right to be heard on the merits of the question of whether the Lady Elgin was indeed abandoned. The district judge entered an injunction barring all potential rivals, including Illinois, from interfering with the plaintiffs' efforts to raise artifacts from the wreck. The injunction was reversed by the Court of Appeals which held:

> The strength of the state's legal position is irrelevant; the Eleventh Amendment prevents the district judge from exercising jurisdiction.

960 F.2d at 670.

To determine whether Illinois' claim was colorable, only a cursory review of the merits was allowed. The Seventh

Circuit defined a colorable claim as merely a determination of whether a state has "some interest":

> We hold that it is the existence, and not the strength of the claim that activates the eleventh amendment. No one doubts that Illinois has a claim, which is the principal target of the district judge's injunction.

960 F.2d at 670.

In the instant case, there is no dispute that the State of Michigan owns the bottomlands where any remains of the Captain Lawrence are embedded. The injunction requested by the Petitioner would have prohibited Michigan from interfering in any way with Petitioner's activities within a 12.6 square nautical mile area. Furthermore, Michigan was the only competing claimant. The Eleventh Amendment deprived the district court of jurisdiction to determine the strength of Michigan's claim.

Other shipwreck cases which construe the meaning of "colorable claim" did involve undisputably abandoned shipwrecks. However, the concept of abandonment was not central to the holding that the district court simply did not have jurisdiction to adjudicate a state's claim to the vessel. Thus, in *Marx v. Guam, supra*, the Ninth Circuit held that a colorable claim was established by Congress' grant of title and control to the submerged lands in the Submerged Lands Act, 43 U.S.C. § 1311 *et seq.*, and to all shipwrecks embedded in those submerged lands under the ASA. 866 F.2d at 300. The mere existence of those statutes, and Guam's assertion of title to property in its territorial waters was the "colorable claim" which deprived the district court of jurisdiction.

Similarly, the First Circuit in *Maritime Underwater Surveys, supra*, stated that it had no doubt that the state's claim was "at least colorable," but did not decide the claim "because of the Eleventh Amendment's flat prohibition of suits against states regardless of their merit." 717 F.2d at 7-8. It is therefore clear that a "colorable claim" is a claim advanced by a state based on presumptively valid state and federal statutes.

The following analysis of the court in *Subaqueous Exploration v. Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 607 (1983), should have guided the district court in the instant case:

> The Court finds that the Submerged Lands Act of 1953, 43 U.S.C. § 1301 et seq. and Md. Nat. Res. Code Ann. § 2-309, fairly and reasonably construed, fully provide a colorable basis for the State of Maryland's claim of possession of the defendant vessels and their cargo. As mentioned earlier, the Submerged Lands Act confirmed the coastal states' title to and proprietary rights in the lands beneath navigable waters within three geographical miles from the coast line, see 43 U.S.C. §§ 1312, 1311(a), with the capacity to exercise dominion and control thereover subject to Congress' reserved right to regulate commerce, navigation, national defense, and international affairs, see id. § 1314. See, e.g., United States v. California, 436 U.S. 32, 37, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978) (Submerged Lands Act "transferred dominion" over submerged lands to state); United States v. Alaska, 422 U.S. 184, 187, 45 L. Ed. 2d 109, 95 S. Ct. 2240 (1975); United States v. Maine, 420 U.S. 515, 525, 43 L. Ed. 2d 363, 95 S. Ct. 1155 (1975) ("the Submerged Lands Act did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act)." This Court has already found that the defendant vessels and their cargo are situated on submerged lands belonging to the State of Maryland. Section 2-309 of Maryland's Natural Resource Article expressly declares that items of historical or archaeological value situated on state-owned or state-controlled land are the property of the State of Maryland. Md. Nat. Res. Code Ann. § 2-309. This Court has already found that the defendants in these proceedings are items of archaeological or

> historical value within the meaning of section 2-309. Consequently, these federal and state statutes provide a colorable basis for the State of Maryland's claim of possession of the vessels and their cargo.

577 F. Supp. at 608.

While Petitioner in the instant case did not discover artifacts of archeological or historical value, the district court did not have jurisdiction over Petitioner's request to dredge state bottomlands for archeological or exploratory purposes. *Lathrop v. The Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 961, 966 (M. D. Fla. 1993).

In these proceedings, Michigan advanced a "colorable claim" based upon the ASA; the Submerged Lands Act, *supra*; the Great Lakes Submerged Lands Act, MCL 322.701; MSA 13.700(1), by which Michigan holds title to the unpatented bottomlands of the Great Lakes within its boundaries; and the Aboriginal Records and Antiquities Act, MCL 299.51 *et seq.*; MSA 13.21 *et seq.*, in which Michigan has declared its superior title to abandoned property of historical or recreational value found on state-owned bottomlands. MCL 299.51, *supra*, has been held constitutional and not violative of federal admiralty jurisdiction. *People v. Massey*, 137 Mich. App. 480; 385 N.W.2d 615 (1984).

## CONCLUSION AND RELIEF REQUESTED

The writ of certiorari should be denied on the question presented by Petitioner. Alternatively, the case should be held in abeyance until this Court decides the constitutional question in *California v. Deep Sea Research, Inc.*, No. 96-1400, *i.e.* whether, in an *in rem* admiralty suit, Eleventh Amendment immunity is contingent upon a State first proving to a district court by a preponderance of the evidence that the State owns the shipwreck.

Respectfully submitted,

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(3)

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No. 96-1936

# IN THE
# Supreme Court of the United States

OCTOBER TERM 1996

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FAIRPORT INTERNATIONAL EXPLORATION, INC.,
*Petitioner,*

*v.*

THE SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, *in rem,*
*Respondent,*

STATE OF MICHIGAN,
*Intervenor,*

---

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## REPLY BRIEF FOR THE PETITIONER

---

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No. 96-1936

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

## REPLY BRIEF FOR THE PETITIONER

---

When the Sixth Circuit handed down its decision, Respondent hailed it as a maritime law landmark. Now that Fairport International seeks relief from the Court, Respondent

suddenly sees the case as insignificant and factbound. Respondent's first impression was correct. The opinion below breaks with the Fourth Circuit to create an admiralty law conflict of national and international significance. Respondent has offered no reason in its Opposition why the Court cannot or should not grant certiorari to resolve the important issue presented.

1. Respondent's half-hearted suggestion that the issue in this case is fact-bound studiously avoids the point. Had the court below followed the Fourth Circuit's express abandonment rule, it would have been required to find that the *Captain Lawrence* was not an abandoned shipwreck, and accordingly that the State of Michigan did not have title under the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (1988).

This is because there was not even a scintilla of evidence of an express abandonment by Petitioner's privies in title. The State does not contend, and there is no evidence in the record that would support, that the owners expressly or affirmatively abandoned title to the *Captain Lawrence.* Accordingly, under the Fourth Circuit's express abandonment rule, the District Court had no discretion in the matter and was required to make a finding of non-abandonment. But for the fact that this suit was tried in the Fourth Circuit rather than the Sixth Circuit, the result would have been different.

Respondent's resort to the Submerged Lands Act, 43 U.S.C. § 1301 et seq. and Michigan statutes granting the State control over its bottom lands ignores the nature of this action. This is not an action asserting rights in natural resources on the seabed but rather a claim for rights in a cultural deposit. Accordingly, the Abandoned Shipwreck Act controls. The very purpose of the Act, as shown by its legislative history, was to eliminate the morass of litigation and confusing creating by a tangle of prior state and federal laws.

If the *Captain Lawrence* is not abandoned, the Respondent has no colorable claim to the shipwreck. While the State may have a claim to natural resources, its rights to cultural deposits is governed by the Abandoned Shipwreck Act.

Under the rule in the Fourth Circuit, only an "express declaration abandoning title" can suffice to prove abandonment any time a purported owner claiming title appears. It is the court of appeals' legal rule governing abandonment--not a factual determination--that is at issue here.

2. Respondent's brief does not, and cannot, deny that there is conflict among the circuits on the definition of abandonment. Both the Sixth and the Ninth Circuits have openly acknowledged the circuit conflict and have rejected the Fourth Circuit's express abandonment rule, and have instead applied the inferred abandonment theory. Leading commentators have also noted the conflict among the cases. 3 A. M. Norris, *Benedict on Admiralty*, § 158 (7th Cir. 1993), T. Shoenbaum, *Admiralty and Maritime Law* §§ 15-7 (1987); Edelman, *Who Gets Treasure Recovered From the Sea?* N.Y.L.J. Dec. 4, 1992 at 3, 4 (conflict will need resolution by the Supreme Court."); Giesecke, *To Be or Not To Be Abandoned,* Sea Technology, Jan. 1993 at 93.

One can imagine the confusion, indeed, the chaos, of having 50 separate definitions of abandonment facing a court which must apply the ASA. Federal admiralty jurisdiction would be balkanized as federal courts struggled to determine which of the State's definitions of abandonment it would apply. The uniform exercise of this jurisdiction is a question of significant enough importance that this Court should supply a uniform federal rule as to what definition of maritime abandonment federal courts must apply in cases under the ASA.

3. The importance of the legal issue raised here has been amply demonstrated by the many filings submitted to the Court in this and earlier cases. The development of new recovery methods has vastly multiplied the practical significance of this area of the law. *See generally Deepest Wrecks Now Visible in Undersea Cameras*, N.Y. Times, Feb. 2, 1993, at B1. The conflict among the federal circuits, and resulting confusion in the law, will not only chill private exploration efforts but also adversely affect the interests.

Respondent's attempt to diminish the significance of this conflict among the circuits is inconsistent with the uniform nature of federal admiralty law. The forum shopping and confusion that result from this conflict among the circuits is precisely the reason for reviewing this matter on certiorari and providing guidance to the courts on certiorari.

Respondent's ostensible concession, that the Court should pass over this matter until its decision in the *Brother Jonathan*, assumes that the Court will definitively address the abandonment issue in that case. Since the Eleventh Amendment is also an issue in that case, it is possible that the Court may decide that appeal without resolving the conflict among the circuits on the maritime definition of abandonment. It is vital that the Court grant certiorari in this case to assure that this conflict is finally resolved.

The conflict among the circuits threatens both the uniformity of the law of admiralty and the viability of emerging deep sea exploration and recovery initiatives. The ASA divests a federal court of jurisdiction in all cases where a marine salvager presents a claim involving a wreck to which the ASA applies. It is imperative for the uniform operation of federal law that all federal courts apply the ASA consistently. Thus, all federal courts must use the same standards when determining if the ASA applies to a wreck under litigation. Since that determination depends on the definition of

"abandonment," federal courts must have a uniform definition of abandonment from which to proceed.

For the reasons discussed above, this Court should grant Fairport's petition and issue a writ of certiorari to the United States Sixth Circuit Court of Appeals for the purposes of (1) reviewing that court's definition of abandonment under the Abandoned Shipwrecks Act and (2) promulgating a uniform, consistent rule regarding the test for abandonment, a test crucial to the uniform exercise of federal admiralty jurisdiction.

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully Submitted,

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IN THE
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OCTOBER TERM, 1996

No. 96-1936

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THE *CAPTAIN LAWRENCE, in rem,*

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STATE OF MICHIGAN,

*Intervenor.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

# MOTION OF COLUMBUS-AMERICA DISCOVERY GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

---

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**IN THE**
**SUPREME COURT**
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OCTOBER TERM, 1996

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FAIRPORT INTERNATIONAL EXPLORATION, INC.,

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*Intervenor.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

# MOTION OF COLUMBUS-AMERICA DISCOVERY GROUP FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

---

Columbus-America Discovery Group hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Intervenor has refused consent.

As noted recently by the Ninth Circuit Court of Appeals, Columbus-America Discovery Group is a

multidisciplinary team of historians, engineers, scientists, and entrepreneurs dedicated to exploring the deep ocean. *Deep Sea Research Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379, 382 n.1 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400). After performing historical research for more than a decade and searching an area the size of Rhode Island, Columbus-America located the SS *Central America*, a legendary Gold Rush steamship that sank in 1857 at a depth of 1⅓ miles, approximately 180 miles east of Charleston, South Carolina. The SS *Central America* was laden with gold and also carried approximately 600 passengers and crew members during its last voyage, yet only 153 of them lived to tell about how the once proud steamship succumbed to the fury of a tropical hurricane.

Since its discovery of the SS *Central America*, Columbus-America has used its robot -- *Nemo* -- to recover gold ingots and coins, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*. For instance, the Group has produced two educational packages (in interactive laser-video disc format) for secondary schools, published a book on the history of the shipwreck, and created museum and zoo exhibits and other materials of interest to both the general public and the scientific community. Columbus-America has also supported an international Adjunct Science and Education Program, whose more than 100 participants from universities, museums, and research laboratories in this country and abroad have discovered a dozen new species of marine life and have researched such diverse areas as deep-sea site degradation mechanics and food chain processes.

The Group's accomplishments have been highlighted in numerous articles, including the March, 1992 *Life* article "The Greatest Treasure Ever Found" and the March, 1995 *Reader's Digest* article "Quest for the Ship of Gold." Noonan, *The Greatest Treasure Ever Found*, Life, Mar. 1992, at 32; *Quest for the Ship of Gold*, Reader's Digest, March 1995, at 202. The Group's qualities have also been described by various courts as follows:

- "What Thompson and Columbus-America have accomplished is, by any measure, extraordinary. We can say without hesitation that their story is a paradigm of American initiative, ingenuity, and determination."

  *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 56 F.3d 556, 576 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged."

  *Id.* at 572.

- "Selection of the personnel to assist was from those most highly qualified and experienced in the contemplated activities. The same criteria was used in selecting the experts who were to evaluate, handle, care for and preserve the artifacts, scientific materials, information and knowledge obtained from the operation, and to preserve and make it available for future use by the public in research and learning."

*Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel*, Civ. A. No. 87-363-N, 1993 WL 580900, *6 (E.D. Va. Nov. 18, 1993), *aff'd*, 56 F.3d 556 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

- "From the inception of the project, [Columbus-America] had assembled experts in the various fields of science, archeology, history, maritime, marketing and publicity, to advise and assist in the use, care and preservation of the shipwreck site....It is sufficient to say that they are the leaders in their field[s] of science and calling."

  *Id.* at *9.

Columbus-America does not have any affiliation whatever, financial or otherwise, with any of the parties in this case. It likewise does not have any monetary interest in the outcome of this matter. Columbus-America does, however, bring a unique perspective to this case because the issue of the standard for abandonment of sunken merchant shipwrecks is a fundamental, purely legal issue that is of paramount importance to scientists, entrepreneurs, and explorers who work not only in the United States, but also around the globe. Having found "an exceedingly small needle in a dauntingly large haystack" in international waters almost 200 miles off the eastern seaboard, *Columbus-America*, 56 F.3d at 572, Columbus-America offers an international vantage point that may help inform the Court's decision.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition.

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**On Petition for a Writ of Certiorari to the**
**United States Court of Appeals**
**for the Sixth Circuit**

---

# COLUMBUS-AMERICA DISCOVERY GROUP'S BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION

---

## STATEMENT OF INTEREST OF THE AMICUS CURIAE

On September 8, 1857, the luxury sidewheel steamer known as the SS *Central America* departed from the port in Havana headed for New York. On board were approximately 600 crew members and passengers from San

Francisco and several tons of gold coins and bars produced during the Gold Rush and its entrepreneurial aftermath.

Everyone on the SS *Central America* was headed straight into history, for soon after leaving Havana, the steamship sailed into the middle of a tropical hurricane. Despite valiant efforts to survive the storm, the ship went down on September 12, 1857, in roughly 8,000 feet of water, some 180 miles east of Charleston, South Carolina.

Approximately 130 years after this famous maritime disaster, Columbus-America Discovery Group's multidisciplinary team of historians, engineers, scientists, and entrepreneurs discovered the SS *Central America*. Since its discovery of the sidewheel steamship, Columbus-America has used its robot -- *Nemo* -- to recover gold, passenger trunks, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*.

The Group's accomplishments have not gone unnoticed. They have received a great deal of attention from the admiralty bar and beyond, and the Fourth Circuit bestowed the following accolade on Columbus-America two years ago: "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 56 F.3d 556, 572, *cert. denied*, 116 S. Ct. 352 (1995).

Columbus-America submits this brief in the hope

that it will assist the Court in addressing a fundamental legal issue that is of paramount importance to scientists, entrepreneurs, and explorers around the world. The issue pertains to the proper standard for determining whether a sunken merchant vessel is abandoned, and its resolution by the Court will help determine the future of exploration on the earth's last frontier.

## STATEMENT OF THE CASE

Fairport International Exploration, Inc. filed an *in rem* complaint in admiralty against the *Captain Lawrence*, seeking the right to salvage the shipwrecked vessel, which sank in the waters of Lake Michigan in 1933. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 913 F. Supp. 552, 553 (W.D. Mich. 1995). The State of Michigan subsequently intervened to assert its claim of title to the shipwreck under the Abandoned Shipwreck Act of 1987 ("A.S.A."), 43 U.S.C. §§ 2101-2106 (1988), and to request that the case be dismissed because (i) the State had a colorable interest in the shipwreck, and (ii) Fairport International's action was a suit against the State prohibited by the Eleventh Amendment to the United States Constitution. *Fairport International*, 913 F. Supp at 553-54.

The District Court for the Western District of Michigan held that the State was required to prove by a "preponderance of the evidence" that the *Captain Lawrence* was actually abandoned. *Id.* at 554-55. Noting that the issue of abandonment was critical to the distribution of jurisdiction between state and federal courts, the district court reasoned that the standard for abandonment under the A.S.A. was consistent with the rule of inferred abandonment traditionally applied by

courts sitting in admiralty. *Id.*

The record in the *Captain Lawrence* case did not contain any evidence whatever that the vessel's owner had expressly renounced title or affirmatively disclaimed an interest in the shipwreck. *Id.* at 557. In fact, there was no evidence that anyone in the owner's chain of title had renounced ownership. Moreover, Fairport International claimed to be the successor-in-interest to the original owner. *Id.*

The district court nevertheless found that the *Captain Lawrence* had been abandoned. While the district court cited the Fourth Circuit's "express abandonment" standard in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.* 974 F.2d 450, 461-68 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), it applied the traditional, inferred abandonment rule, and concluded that "[t]he evidence, *although circumstantial*, clearly demonstrates [the owner's] intent to abandon the vessel." *Fairport International*, 913 F. Supp. at 558 (emphasis added). The district court's conclusion was based on the totality of the facts and circumstances, including the owner's failure to salvage the vessel, his failure to discuss the shipwreck with his family, the absence of documents leaving his interest to his heirs or anyone else, and his successors' failure to seek out potential salvors until they were approached and advised of available recovery equipment and potential salvage efforts.[1] *Id.* at 558-59.

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[1] Although the district court in the *Captain Lawrence* case suggested that the SS *Central America* case was factually distinguishable on grounds that technology to locate and recover the SS *Central America* had not existed prior to Columbus-America's efforts, *Fairport International*, 913 F. Supp. at 558, the district court that decided the SS

(continued...)

On January 30, 1997, the Sixth Circuit Court of Appeals affirmed the district court's decision in this case. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem,* 105 F.3d 1078 (6th Cir. 1997). Fairport International had argued to the appellate court that the district court had "erred in determining that the vessel was abandoned because abandonment cannot be shown in the absence of strong and convincing evidence, such as an owner's express declaration of abandonment, and because the circumstantial evidence relied on was weak." *Id.* at 1083. The State of Michigan, in turn, had urged the Sixth Circuit not to adopt the Fourth Circuit's rule, and accordingly to reject the salvor's argument that abandonment could not be inferred based on circumstantial evidence. *Id.*

In a 3-0 opinion, the Sixth Circuit flatly rejected the "express abandonment" test and held that abandonment can be inferred. The appellate court affirmed the district court's conclusion that (i) "'[t]he evidence, although circumstantial, clearly demonstrates Wilfred Behrens' intent to abandon the vessel,'" *id.* at 1081, and (ii) the

---

[1](...continued)
*Central America* case made no finding that the technology had not existed. That court, on the contrary, found that "even after scientific means of locating shipwrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in th[at] case, still not one of the insurance companies undertook to locate or recover the Central America." *Columbus-America Discovery Group v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1345 (E.D. Va. 1990). Moreover, the Fourth Circuit did not limit its express abandonment test to situations where the technology did not exist. *Columbus-America*, 974 F.2d at 464-67. There is no logical reason why this should have anything to do with the test, because the availability of technology is merely one of many factors to be considered under the "inferred abandonment" rule.

State of Michigan had thus "'met its burden of showing by a preponderance of the evidence that the *Captain Lawrence* was abandoned....'" *Id.* The Sixth Circuit summed up its decision to affirm by noting that "there is no question that the district court's finding of abandonment was not clearly erroneous, as there was an abundance of circumstantial evidence justifying an inference of abandonment." *Id.* at 1085.

In its opinion, the court below expressly noted that it was adopting the abandonment standard articulated by the Ninth Circuit last July in the *Brother Jonathan* case and was thus rejecting the "opposing view" expressed by the Fourth Circuit in the *Columbus-America* case. *Id.* The Sixth Circuit explicit stated that it was "follow[ing] the lead of *Brother Jonathan* rather than that of *Columbus-America*" because the reasoning in the *Brother Jonathan* case "accords with the vast majority of decisions that have discussed the [abandonment] issue." *Id.* at 1084-85.

In describing the proper test for abandonment, the Sixth Circuit quoted from the Ninth Circuit's recent decision:

> "Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is 'so long lost that time can be presumed to have eroded any realistic claim of original title.' (citations omitted).
>
> * * *
>
> "[The district court's] holding that the

> Brother Jonathan is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage effort on the part of the owners."

*Id.* at 1084 (quoting *Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379, 387-88 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400)).

In a diplomatic effort not to accentuate its fundamental disagreement with the Fourth Circuit, the Sixth Circuit observed that it did not need to engage in an in-depth analysis of the *Columbus-America* case because that case did not involve the A.S.A.:

> We find it unnecessary to undertake an analysis of whether the *Columbus-America* court correctly interpreted the laws of salvage and finds and their varying approaches to abandonment; we simply note that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances.

*Fairport International*, 105 F.3d at 1085.

The Sixth Circuit reached this decision because of its conclusion that "common sense makes readily apparent that the [A.S.A.] did not contemplate a court's requiring express abandonment; such explicit action is obviously rare indeed, and application of such rule would render the ASA a virtual nullity." *Id.*

## REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address the significant legal and practical consequences of the split among the federal circuits concerning the standard of abandonment applicable to maritime exploration and recovery.

Given the pendency of other cases raising similar issues, *see Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d 379 (9th Cir. 1996), *cert. granted*, (U.S. June 9, 1997) (No. 96-1400); *Bemis v. The RMS Lusitania*, 1996 U.S. App. LEXIS 24373 (4th Cir. Sept. 17, 1996), *petition for cert. docketed*, (March 14, 1997) (No. 96-1448), the Court's action here is certain to have critical effects on the emerging industry of high-technology maritime recovery. The disposition of this case also has important implications for state and federal management of historic shipwrecks under statutes governing "abandoned" maritime property. In short, this case is an appropriate vehicle for resolving a nationally and internationally important maritime issue.

### I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE TEST FOR DETERMINING WHETHER LONG-LOST SHIPWRECKS ARE ABANDONED.

#### A. Federal Circuits are in Direct Conflict Over the Test for Abandonment of Long-Lost Shipwrecks.

This case calls upon the Court to address the standard for finding abandonment of long-lost sunken

vessels. As noted by the court below, there are two conflicting views among the federal circuits on the standard for abandonment:

> The ASA itself does not define the term "abandoned," but two recent cases articulate the conflicting views on what is required to make an adequate showing. The first is *Brother Jonathan*, itself, decided after the district court decision in this case, but supporting its reasoning. A very different definition of "abandoned" is found in *Columbus-America* (citations omitted).

*Fairport International*, 105 F.3d at 1084.

As explained above, the Sixth Circuit declined to follow the "express abandonment" theory applied by the Fourth Circuit in the SS *Central America* case, and instead applied the rule of inferred abandonment.

The SS *Central America* case arrived at the Fourth Circuit after the District Court for the Eastern District of Virginia had an opportunity to consider the competing claims of Columbus-America and 39 insurance companies that had intervened to assert that they or their predecessors-in-interest had insured some of the gold aboard the SS *Central America* when it sank. *Columbus-America*, 974 F.2d at 455. The district court concluded that the shipwreck was abandoned because it could be inferred from the passage of time, the claimants' inaction, and all of the other relevant facts and circumstances that the insurance companies had abandoned any interest that they may have had in part of the steamship's cargo. *Columbus-America*, 742 F. Supp. at 1343-1348. The district court further found that much uninsured cargo was

aboard the vessel and there was no evidence that the gold recovered by Columbus-America was part of any insured shipment. *Id.* at 1347.

In a split 2-1 decision, the Fourth Circuit reversed, holding that although the hull and the passenger gold and effects on the ship were admittedly abandoned, the remainder of the cargo claimed by the insurance companies could not be considered abandoned unless Columbus-America proved by "clear and convincing evidence" that the insurance claimants had made an "express" abandonment. *Columbus-America*, 974 F.2d at 461, 464, 468. Because Columbus-America could not show that the insurance claimants had signed a formal document or made a public announcement disclaiming any interest that they may have had in the gold, the court of appeals reversed the district court's inference of abandonment and remanded the case for a determination of what share of the treasure each insurer would get under the law of salvage. *Id.* at 464-65, 468. In remanding, the court of appeals instructed that the recovered gold would belong in the first instance to the insurance companies to the extent of any insured shipment (despite the district court's finding that there was no evidence that the recovered gold came from any insured shipment), thus erecting a legal presumption that recovered items do not belong to an *in rem* plaintiff. *Id.* at 468.

Judge Widener dissented, criticizing the majority for "its principal holding that the district court's factual finding of abandonment was clearly erroneous; in applying the law of salvage to a long-lost wreck; [and] in making factual findings as an appellate court." *Id.* at 471 (Widener, J., dissenting). The dissent noted that the majority opinion's requirement of an express abandonment "c[ould] not be reconciled" with "the law of every other

circuit that has decided the question." *Id.* at 472, 477.

The Fourth Circuit split 7-5 in denying rehearing and rehearing *in banc*.[2] Prior to a final judgment in the remanded proceedings, Columbus-America unsuccessfully petitioned for certiorari on an interlocutory basis. *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co, et al.*, 507 U.S. 1000 (1993).

The Ninth Circuit recently characterized the Fourth Circuit's requirement of "an express renunciation of ownership" to prove abandonment as "a significant modification [in] maritime law," thus highlighting the circuit split on the issue. *Deep Sea Research*, 102 F.3d at 388.

As noted above, in the *Brother Jonathan* case, the Ninth Circuit was confronted with the issue of when a shipwreck is deemed to be abandoned for purposes of the A.S.A. The State of California had argued in that case that the district court had "erred by adopting the Fourth Circuit's rule" in the *Columbus-America* case, "rather than relying on the traditional approach to abandonment which allows abandonment to be inferred on the basis of circumstantial evidence." *Id.* at 388.

The Ninth Circuit concluded in a unanimous decision, however, that even though the district court had cited the Fourth Circuit's decision in *Columbus-America*, it had not erred because it had not applied the Fourth Circuit's abandonment test -- but instead had correctly

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[2] Judge Hall, who had joined in the majority opinion, voted against a rehearing before the panel, but for consideration of the case by the full court *in banc*.

applied the traditional maritime rule:

> Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced *or* 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners....Thus, the State's argument that the district court applied the wrong test lacks merit.

*Id.* (emphasis added). The Ninth Circuit elaborated as follows:

> Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is "so long lost that time can be presumed to have eroded any realistic claim of original title."

*Id.* at 387 (quoting *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987)).

The Sixth Circuit subsequently underscored the circuit split on the definition of abandonment when it specifically noted that it would "follow the lead of *Brother Jonathan* rather than that of *Columbus-America*." *Fairport*

*International*, 105 F.3d at 1085. In a diplomatic effort to avoid a head-on challenge to the Fourth Circuit's decision in *Columbus-America*, the Sixth Circuit stated that it did not need to directly reject that decision because it did not involve the A.S.A., but "simply note[d] that there is ample authority that abandonment may, for some purposes at least, be inferred from the surrounding circumstances." *Id.* The Sixth Circuit reached this decision because, as it commented, "[c]ommon sense makes readily apparent that the [A.S.A.] did not contemplate a court's requiring express abandonment: such explicit action is obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." *Id.*

The decision of the Sixth and Ninth Circuits to apply the inferred abandonment rule is consistent with the legislative history of the A.S.A., which evidences Congress' intent to incorporate the traditional maritime meaning of abandonment into the statute. The text of the A.S.A., however, contains no definition of the term "abandoned." Accordingly, the statute must be assumed to have used abandonment as judicially defined in admiralty law. *See, e.g., Evans v. United States,* 504 U.S. 255, 260 (1992) (citing Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 537 (1947)).

The legislative history of the A.S.A. confirms that the traditional general maritime law standard of inferred abandonment was intended by Congress:

> The Committee notes that the term 'abandoned' does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an

> owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514 (I) at 2, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365. *See Brother Jonathan*, 102 F.3d at 387; *Fairport International*, 105 F.3d at 1084.

Because the A.S.A. simply incorporates the traditional rule of abandonment rather than imposing a legislative definition, there is no logical reason why different standards of abandonment should be applied in A.S.A. cases as opposed to cases that do not involve that statute.

Significantly, there is a long line of pre-A.S.A. authority that the abandonment of sunken merchant vessels may be inferred. *See Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064-65 (1st Cir. 1987); *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). Despite that fact, the legislative history of the A.S.A, and the *Brother Jonathan* and *Captain Lawrence* cases, the Fourth Circuit's test has not only been cited, but also adopted outside the Fourth Circuit. *See Marex International v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825, 828 (S.D. Ga. 1997) ("The law of salvage applies to shipwrecks that have not been expressly abandoned by their owners."); *Zych v. The Unidentified, Wrecked, and Abandoned Vessel, believed to be the SB "Seabird"*, 811 F. Supp. 1300, 1309-11 (E.D. Ill. 1992, *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 115 S. Ct. 1994). The circuit case law in this area is conflicting and confusing, requiring resolution by the Court.

### B. This is an Appropriate Case in Which to Resolve the Conflict and Provide Guidance on the Proper Test for Determining Whether a Sunken Merchant Vessel is Abandoned.

This case provides an appropriate vehicle for the Court to provide guidelines on the admiralty law standard of abandonment discussed above. The conflict among the circuits is plain, and it has been openly acknowledged by the Sixth and Ninth Circuits.

The issue presented by the petition is purely legal. The facts are not complex, and the outcome of the opinion below turns on the very question as to which a conflict exists.

Only this Court is capable of resolving the circuit conflict on this issue. This is consistent with the Court's constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-402 (1970)). That uniformity is threatened by the conflict highlighted by the opinion below. A conflict among the admiralty courts is even more intolerable in the context of shipwreck recovery, where venue is proper in any district where the recovered property may be brought upon recovery, giving every incentive for forum shopping. *See* 28 U.S.C. § 1333 (1996); *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981). The Court should grant certiorari to resolve the conflict and provide guidance to the lower courts.

### C. The Court Should Consolidate Consideration of this Case with *Deep Sea Research, Inc. v. The Brother Jonathan.*

The issue raised in Fairport International's petition is similar to an issue raised in the *Brother Jonathan* case mentioned above, which the Court recently agreed to hear. The facts in that case are also well-developed, the record is clear, and resolution of that case will turn on the question in Fairport International's petition. Consideration of this case in conjunction with the *Brother Jonathan* case will help sharpen the focus of these proceedings and serve the interest of consistency in clarifying the rule that should be applied by the federal circuits.

## II. NEW ADVANCES IN MARINE TECHNOLOGY HAVE MULTIPLIED CONFLICTS OVER THE MARITIME TEST FOR ABANDONMENT, REQUIRING THIS COURT'S EXERCISE OF ITS CONSTITUTIONAL ROLE IN FASHIONING THE DEVELOPMENT OF MARITIME AND INTERNATIONAL LAW.

The Court's resolution of conflicts is especially important in admiralty matters. The issue raised here "is one of importance in the development of the law maritime, as to which [the Supreme Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

The divergence in the approaches of maritime courts in determining the proper test for determining whether a sunken merchant vessel is abandoned is plain.

*See* Edelman, *Who Gets Treasure Recovered From Sea?*, N.Y.L.J. Dec. 4, 1992, at 3, 4, (discussing change in law effected by Fourth Circuit and concluding that there is a need for resolution by the Court of "[w]hat proof is needed to show abandonment").

The development of new maritime technology has made a conflict among admiralty law doctrines inevitable. Moreover, with the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of presumptions regarding property interests and the test for abandonment issues of growing significance.

Although the Federal Government's public policy strongly encourages deep-sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technology, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in such exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation -- Background Paper*, OTA-BP-E-37, 8 (1987).

Under the inferred abandonment rule, the risks noted above are balanced against the certainty and predictability that, in appropriate circumstances, title will vest in an explorer who succeeds in locating and possessing ancient artifacts on the seabed. The express abandonment rule, however, provides an open invitation to highly speculative and fabricated claims. Under that rule, only after incurring the expense of bringing articles to the surface will deep-sea explorers know how much

risk, including the risk of an adverse claim to title, is involved. That risk is particularly acute as to historic shipwrecks, where much time between the loss and the recovery has often passed, substantial sums may be at stake, and no express abandonment has occurred. In the words of the Sixth Circuit, "such explicit action is obviously rare indeed." *Fairport International*, 105 F.3d at 1085. For this reason, the confusion created by the conflict among the circuits provides maritime explorers and entrepreneurs with an unfortunate disincentive to invest sufficient resources in deep-sea recovery projects.

The opportunities for scientific research and development with respect to long-lost and abandoned shipwrecks are tremendous. Such cultural deposits are unique laboratories, in many instances teeming with life forms and mysteries never before explored. But the "express abandonment" theory squanders opportunities for scientific research and development by making the financial incentives associated with technologically advanced discovery and recovery uncertain and unpredictable, thereby making it difficult, if not impossible, to attract the enormous sums of private venture risk capital needed for such challenging ventures.

Without predictable legal rights, discoverers will effectively be paralyzed and unable to attract the huge sums of capital required for these inherently risky ventures. *See* 30 U.S.C. § 1401(a)(13) (1994) (uncertainty in legal regime discourages private investment).

The conflict among the circuits over the standard for abandonment thus has important implications for the future ability of non-governmental institutions to participate in the benefits and innovations of high-tech exploration of the deep ocean.

## III. ABSENT RESOLUTION BY THIS COURT, THE CONFLICT AMONG THE FEDERAL CIRCUITS WILL CONTINUE TO SPAWN CONFUSION IN FEDERAL-STATE JURISDICTION AND IN THE LAW GOVERNING THE PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS.

The uncertainty over the maritime presumptions regarding property interests and abandonment that arises from the conflict among the federal circuits has important implications for the law governing the management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I). Congress and the States have accordingly passed legislation aimed at protecting these historic resources. The federal-state jurisdictional conflict that inherently results from the rule applied in the Fourth Circuit, however, places the practicable administration of such legislation in doubt and makes conflicts of jurisdiction inevitable between federal and state courts.

As noted above, the major federal statute on point is the A.S.A. Under the A.S.A., the United States asserts title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, but transfers title of most such shipwrecks to the State on whose submerged land they are located. 43 U.S.C. § 2105. States are encouraged under the A.S.A. to take steps to protect abandoned shipwrecks for recreational and historical purposes. *Id.* at § 2104.

Under the rule in the Fourth Circuit, shipwrecks will rarely be deemed abandoned. Absent an express

abandonment, the ownership claim of anyone who appears to assert an interest is instead preserved, and the wreck is not considered abandoned, thus, in the words of the Sixth Circuit, "render[ing] the ASA a virtual nullity." *Fairport International*, 105 F.3d at 1085. Extending the "express abandonment" theory therefore has the potential of removing from the coverage of the A.S.A.'s protection any number of shipwrecks that would previously have been considered abandoned under traditional maritime and common law and that Congress clearly intended be covered when it relied on the traditional doctrine of inferred abandonment.

This split among the circuits thus has significant implications for the distribution of jurisdiction between state and federal courts and in the proper management of our sunken merchant vessels. The Court's attention to the issue is warranted now to avoid further confusion in this area.

## CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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